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THE LAW OF LIBEL. — THE SUMMING UP TO THE JURY OF LORD CHIEF JUSTICE COCKBURN IN THE CASE OF SEYMOUR *v.* BUTTERWORTH.

[The "Law Magazine and Law Review," for February last, devotes most of its space (one hundred and fifty pages) to a verbatim report of the trial of the action of William Digby Seymour Q.C. M.P. against Mr. Butterworth, the publisher of that periodical, for libel. The course of the trial exhibited nothing worthy of note. Mr. Lush Q.C. was senior counsel for the plaintiff, and Serjeant Shee for the defendant. As the report gives "the summing up of the Chief Justice, the speeches of counsel, the questions and answers in examination, and even the casual observations made during the trial, unabridged even by the omission of a syllable," some may desire to refer to it, to ascertain how cases are there tried.

The plaintiff, Mr. Seymour, is the son of a clergyman — graduated with honors at the Dublin University, and afterwards came to England, where he was called to the Bar in 1846. In 1852 he was elected member of Parliament for Sunderland. In 1854 he was appointed Recorder of Newcastle-upon-Tyne, and now holds that office. Upon receiving this appointment he vacated his seat for Sunderland; and becoming a candidate for re-election, he failed to be re-elected. In 1859 he was returned to Parliament from Southampton, and is now one of the members for that borough. In 1861 he was made Queen's Counsel by Lord Campbell, then the Lord Chancellor. Soon after this appointment, certain charges were made against him before the Benchers of the Middle Temple, respecting his conduct in some business transactions, the most recent of which had taken place six years before. He had at that time become involved, as the result of a speculation in shares in joint-stock companies, and took the benefit of the "Private Arrangement Act." He appeared before the Benchers in answer to their notice. They found that the charges of misconduct were not proved, although much was "worthy of severe condem-

nation." A charge of unprofessional conduct, admitted by Mr. Seymour, was found by the Benchers to be established. The misconduct consisted in this: Mr. Seymour was indebted to a solicitor, and upon being applied to for payment, had offered, as the only means by which to discharge the obligation, to return whatever fees should come to him from that solicitor's office.

While this hearing was going on before the Benchers, reports injurious to Mr. Seymour were circulated in Southampton, and after their judgment was given he went before his constituents for explanation. Upon his arrival at Southampton, he found placards over the town, referring to these proceedings before the Benchers. In his address, he alluded to the action of that body, and spoke of himself in a manner which, to say the least, was not in the best taste.

These proceedings before the Benchers, the speech at Southampton, and the mode of obtaining his promotion as Queen's Counsel and the appointment as Recorder, were made the subject of comment in the article containing the alleged libel.

This outline of Mr. Seymour's career, with the other facts stated by the Chief Justice in his address, will enable the reader to understand the case as it was presented to the jury.]

SUMMING UP OF LORD CHIEF JUSTICE COCKBURN.

Gentlemen of the Jury,—In entering upon the judicial consideration of this case, on your part and on mine, some difficulty arises from the way in which it is presented to us to deal with; inasmuch as the whole of this article, from the beginning to the end, is set forth in the Declaration as libellous matter complained of by the plaintiff; and, inasmuch as the article embraces various parts of Mr. Seymour's conduct, both public and private, and is at the same time accompanied with various reflections, political, professional, and personal, it is rather difficult, at the first onset, so to analyze the case in one's own mind as to deal, as one must do, separately and distinctly with each of these heads. I will do my best to assist you by dividing the whole of the article into the various heads of complaint which appear to have been referred to in the course of the discussion. The article professes to deal with the political, professional, and personal conduct of Mr. Digby Seymour. In dealing with each of these various heads, many observations are made of a general character; and it is difficult to say, as one goes through them, to what extent these observations are intended to apply immediately to the gentleman who brings this action. We must do our best, however, to distinguish carefully the various heads of charge, and to see how far they contain libellous matter,

and how far they really reflect on the character and conduct of the plaintiff in the cause.

Now, gentlemen, I think the whole may be reduced sufficiently for the present purpose to three main heads: the conduct of Mr. Digby Seymour in obtaining the Recordership of Newcastle-upon-Tyne; the conduct of Mr. Digby Seymour in obtaining his promotion to the rank of Queen's Counsel; and, lastly, his private conduct in respect to certain pecuniary transactions which formed the subject-matter of the inquiry which took place before the Benchers of the Middle Temple. It is not disputed by the learned counsel for the plaintiff that, as regards a man's public political conduct, that is matter for the freest and fullest discussion on the part of a writer in a public journal; but with regard to those things which relate to the private conduct of Mr. Seymour, Mr. Lush (his Counsel) takes a distinction. He says, you have a right to discuss, with the fullest freedom and latitude, the public conduct of a public man; but you have no right to pry into the transactions of his private life and conduct, and make them the subject-matter of public obloquy and public criticism. With regard to that last proposition, I shall think it necessary to address a few observations to you when I come to that part of the inquiry which relates to these charges of pecuniary delinquency. With regard to the first portion of the case, we are not embarassed by any such distinction. It is admitted that the public conduct of a public man, political or professional, is a fair subject for discussion, a fair subject for hostile criticism, and a fair subject for hostile animadversion, provided that the language of the writer is kept within the limits of an honest intention to discharge a public duty, and that his observations are not made the vehicle or the instrument of slander and of malice, using criticism not as a means of fair discussion, but of slanderous and malicious accusation.

Now, what is it that this article alleges with regard to Mr. Digby Seymour as connected with his acceptance of or obtaining the Recordership of Newcastle-upon-Tyne? The article begins with general observations, as to which it is impossible, I think, to say that they do not come fairly within the scope and province of a public writer. Whether it is desirable that members of the Bar, being in the House of Commons, shall receive appointments to subordinate offices held by members of that profession while they are in Parliament, as the reward of their parliamentary adhesion to one or the other of the great political sections of the State, is a matter which nobody, for a single instant, would deny to be a perfectly fair subject for public discussion. On the one hand, it is said if a man is otherwise entitled, by his professional standing, by his attainments and his character, to an appointment to a professional office which happens to fall vacant, why should he be excluded because he is a member of the House of Commons? Nay,

the argument goes further;—it is said, why should not the influence which he fairly acquires with the Government of which he is an adherent and a supporter, be fairly used by him in order to obtain the promotion to which, perhaps, he would not attain were it not for that circumstance, but for which, nevertheless, if he is fortunate enough to obtain the object of his desire, he is perfectly qualified. Well; that is a very fair argument on the one side of the question. On the other side it may be said, that although there is no objection to a man who is a member of Parliament taking office if he takes it with all the responsibilities of office and in the face of the public; that although there is no objection to promotion when that promotion takes a man out of his sphere in the House of Commons, by promoting him to a judicial office inconsistent with his being a representative of the people; there is an objection, and a well-founded objection, to men who ought to be, according to the theory of the constitution (whatever may be its practice), free and independent members of the Legislature as representatives of the people, accepting office while in Parliament and putting themselves under a sense of favor and obligation which binds them, as it were, to a particular course of conduct. All these are perfectly fair matters for discussion; and I entirely agree, and I think you also will agree, with the learned counsel who addressed you on the part of the defendant, that it is not only within the province of a public writer to discuss such subjects, but that he is fully and fairly entitled, if his opinion be that such a course of proceeding is detrimental to the independence of the Bar, to the independence of Parliament, to the due representation of the people and to the Government as the Government ought to be carried on, to animadvert with severity on the conduct of those who give, on the one hand, and those who receive, upon the other.

Now, if the article in question confines itself within those limits; if it discusses the propriety of giving or receiving patronage under such circumstances; if having established, as the writer thinks, the impropriety of such a system, it proceeds to animadvert upon those who have lent themselves to it on the one side or on the other, I apprehend no one would doubt that that is within the legitimate province of a public writer. But if the writer goes beyond that, and asserts that a Member of Parliament, being a member of the Bar, has bargained to sell his vote upon a corrupt contract, and asserts that whereas the member would not, under other circumstances, have voted in a particular way, that he has either spoken or voted, or both, in support of a particular measure or against that particular measure, under a corrupt understanding that his adhesion was to be purchased by a corrupt vote,—that I apprehend no one would hesitate to say is a most serious charge; a charge that no man, whether writing in private or in public, ought to dare to make

against another, unless he is prepared to prove and to substantiate an imputation of so gross and serious a character. I know there are some persons who entertain very shadowy notions about public morality, and the honor and integrity of public and political character. I trust that such opinions will never find their way into the jury-box, when a man who has had a charge of that kind made against him comes forward to vindicate his character in a court of justice. I trust, for the honor of the country to which we belong, that there is such a thing as political honor and political integrity; and I trust that a matter of such serious importance to the well-being of us all, will never be treated lightly or contemptuously in a court of justice; and that if a charge is made against a man of having sold himself and his vote on a corrupt bargain for promotion to an office, or to any other object of ambition or desire, unless the charge can be substantiated it will not be treated lightly by a jury. But then, gentlemen, it is for you to say whether, upon reading this article, it amounts to more than this; that here is a vicious and bad system existing in the government of the country, carried on by whichever section of the great factions or parties of the State it may be, which is unhappily prevalent, of rewarding political adherents by the distribution of patronage and by appointments to offices, which appointments would not otherwise be given to the parties on whom they are conferred. If all that the article means is, that that system, being unhappily prevalent, has led, in the present instance, to the appointment to an office and to the promotion to high professional rank of a gentleman who had no just claim to either, and if that question is fairly discussed, it is not because Mr. Digby Seymour, or anybody else against whom such animadversions may be directed, may smart under them, that, therefore, the jury are to say that the article is libellous. All men who occupy public positions must submit, now and then, to be a little roughly handled, and to be uncourteously, and often unjustly, treated; and people must not be too thin-skinned with reference to such matters. It has happened to everybody who has had anything to do with public life, to have, at one time or other, observations made upon his conduct and motives which, in all probability, at the bottom of his heart he has felt to be unfounded and unjust; but we submit to it, and why? because we know that, upon the whole, that bringing, by means of the public press, the conduct and motives of public men to the bar of public opinion, is the best security for the discharge of public duty.

And now let me call your attention, gentlemen, to what this article is; and then it will be for you to say whether you think that it is only with a view of denouncing a vicious practice which has obtained in the case of Mr. Digby Seymour, that these observations are made; or is it intended to impute to Mr. Digby Seymour that

he has bartered his vote and his parliamentary independence for the sake of obtaining the office of Recorder of Newcastle, in the one instance, and promotion to the rank of Queen's Counsel, in the other? They say in the article,—

"We never were able to discover that Mr. Digby Seymour, during his first sojourn in the House of Commons, added in any appreciable degree either to the usefulness or the brilliancy of that assembly; we are not aware that any measure was secured by his exertions, or any principle elucidated by his oratory, or any party at all benefited by his adherence, save in the matter of his vote."

That is a sort of observation that no man can complain of; anybody may entertain that opinion. In another place they deny his scholarship and his genius. All those are things for which a man must not bring an action for libel. A political adversary, when he is writing adversely, always doubts the motives or denies the ability and genius of the man against whom he is writing. We do not attach any importance to those things. If, for instance, a man sitting down and discussing the merits of various members of the profession, were to say of my brother Shee that he is not a man of genius or of eloquence, we should only laugh at him for saying so, because the contrary is notorious to everybody who knows or has ever had the advantage of hearing him. Nobody would think of bringing an action for such a thing as that. A man's scholarship, his title to be considered a genius, an eloquent man, or a valuable member of society, are all matters which are open to observation; and no man can complain if people do not take so favorable a view of his merits and claims to distinction as he does himself, or as his friends may do for him. But then, after all that, there comes the important matter. They say,—

"For this last" (that is, the matter of his vote) "he was rewarded with the Recordership of Newcastle, to the just dissatisfaction of the Bar, who thought that better men had been passed over for an unworthy political motive."

I do not know that that, again, as regards the Bar, and the opinion that better men had been passed over from political motives, is not a perfectly legitimate observation. Mr. Seymour was a man of eight years' standing; fit for the office probably; but I do not think that Mr. Seymour himself, or his learned advocate on his behalf, would think of saying that the Northern Circuit, comprehending, as it does, so large a portion of the ability and attainments of the Bar, and where there must have been men of so much longer and higher standing than himself, did not contain a number of men to whom that office would have been given in preference to Mr. Seymour, supposing that professional claims to advancement had

alone been taken into account. That does not conclude the question, whether a man in Parliament, who is a supporter of the Government, may not be entitled to the preference — that is a matter of opinion; but it cannot be any hardship upon Mr. Seymour to say that in the profession, the great majority of whom are not in Parliament, there would naturally be some dissatisfaction at finding a man so much their junior in years and in standing promoted to an office which would be, in all probability, an object of ambition and desire to a number of gentlemen on his own Circuit of higher standing and (to say the least) of not inferior ability to himself. They say, —

"For this last he was rewarded with the Recordership of Newcastle."

Then to that there is appended this note, —

"We observe that in his speech at Southampton, Mr. Digby Seymour instances his elevation to the Recordership of Newcastle as a proof of his *professional* success. We believe that Sir George Hayter could, if he were so minded, tell a different tale."

Now, gentlemen, I think it is but fair to call your attention to that paragraph, and ask you to consider (for it is with you) what is meant by it? If you see your way to the conclusion that it is meant to intimate that there was some corrupt contract between the Government and Mr. Digby Seymour, that if Mr. Digby Seymour would give his vote in favor of the Government on any particular question, or generally, he should be rewarded by obtaining this office, then there is no doubt that that is a very serious imputation upon him.

Then, gentlemen, besides that, there is another passage to which I must also call your attention, with reference to this important question of the Recordership; but let me first take you to that part of the article which relates to Mr. Seymour's promotion to the rank of Queen's Counsel. They say: —

"The worst evil attending a weak government is the necessity under which it labors to catch every possible vote in any quarter, and its besetting sin is an improper distribution of patronage; Lord Palmerston's present administration has probably never numbered a working majority of twenty trustworthy votes in the House of Commons, and the political circumstances of the time have tended to diminish the ranks of ministerial supporters."

Those are general observations about which nobody, I suppose, could raise a serious question as to their not being such as might be very properly made by a man who was discussing the subject of public patronage.

"It probably became necessary to secure every doubtful adherent, and this consideration may palliate, but cannot excuse the promotion of Mr. Digby Seymour to the rank of Queen's Counsel. Even at the time of the appointment, rumors were afloat in the profession that his conduct must form the subject of investigation by the Benchers of the Middle Temple, and we have heard that Lord Campbell, shortly before his death, expressed his deep regret that he had been ever led by political pressure to promise a silk gown to the member for Southampton."

Now there, again, I ask you what does that mean? Does it mean that Mr. Digby Seymour obtained his rank as Queen's Counsel by virtue of any corrupt understanding with the Government; or does it merely mean this?—that it is rather an attack upon the Government than upon Mr. Digby Seymour. You see Mr. Digby Seymour, in his speech to the electors of Southampton, cited and referred to his appointment by Lord Campbell as Queen's Counsel as one of the circumstances in his favor; and it has been used in the course of the discussion here as a certificate of character against the charges which had been brought against him before the Benchers of the Middle Temple, and against the censure which the Benchers thought fit to pass upon him. Upon that, the writer of this article makes these observations. He says:—

"If this be so, it furnishes a curious commentary on one portion of Mr. Seymour's speech at Southampton, in which he quotes the patronage of Lord Campbell as a proof of the purity of his professional career."

Now, if what that meant was, "Instead of your citing that as a proof that Lord Campbell considered you a man of unexceptionable character and one upon whom the rank of Queen's Counsel might well be conferred (and you put it forward in that shape to the electors of Southampton) we say the fact is this; that such is the position of Government, from its weakness in the House of Commons, that it is under the necessity of securing every political adherent that it can; and hence it is under the necessity of distributing professional patronage in a manner in which probably it would not otherwise be distributed." If that be all that is meant, you would probably say there is nothing libellous in a public writer, when he is discussing the propriety of such a system of distributing patronage, indulging in such observations. But is that all that is meant to be conveyed, or is it intended to imply that Mr. Seymour has corruptly bargained and sold his parliamentary votes and his independence, to the Government, in order to obtain professional promotion? Then the article goes on to say:—

"It is an extraordinary, and we believe, an unprecedented fact, that a barrister should be arraigned before the Benchers of his Inn

for improper conduct at the very time when the Crown has been induced to raise him to the superior rank of the profession. Yet this, we understand from his own lips, was the case with Mr. Digby Seymour; and the language employed by the Benchers in their judgment forbids us to hope that the inquiry before them was either unjust or uncalled for."

Now, if what was meant by that was simply this: "You have been promoted, not because the Lord Chancellor thought that your professional attainments were such as entitled you to it, but because your promotion was part of the system by which the Government secures adherents; and, in addition to that observation, we must say this, that you were promoted by the Lord Chancellor at a time when there were charges, and grave charges, brought forward against you, and therefore the promotion was one which the Lord Chancellor was not justified in making," it becomes a question, as I have said before, whether that is not fairly within the scope of public discussion with reference to a matter of so much general interest and importance; and if the case had stopped there, I do not, myself, think, I must own, that up to that moment in the discussion of this question of the promotion of Mr. Seymour as Queen's Counsel, anything is said which might not have been said on the promotion of any other gentleman who happened to be a Member of Parliament, and who happened to be promoted to the rank of Queen's Counsel, he being at that time a member of the House of Commons, and an adherent of the Government, subject to this, that there is an allusion to the proceedings which were then pending against Mr. Seymour; but upon that, again, I must observe, that if a gentleman happened to have the misfortune to have grave charges, affecting his character as a gentleman and man of honor, pending before the Benches of the Inn to which he belonged, (the proper tribunal on a question of professional discipline,) and if that were known to the Lord Chancellor, it would not be consistent with the duty of so eminent an individual as the Lord Chancellor to promote a gentleman while those charges were pending against him. But, gentlemen, these observations do not stop there. After setting forth Mr. Digby Seymour's speech to the electors at Southampton (which on every ground I cannot help thinking was a most unfortunate one, and upon which I shall have something to say presently) they say this:—

"If this speech took the public by surprise, it was read by the Bar and the Benchers, though on different grounds, with considerable astonishment. The Bar were amused to find that the promotion of Mr. Digby Seymour, first to the Recordership of Newcastle and then to the rank of Queen's Counsel, could be quoted as any approval of his professional character, when the favor shown

him was notoriously the result of negotiations in the division lobby."

Now, what was that intended to convey? Was it intended simply to say that Mr. Digby Seymour had given his adhesion to the Government in the hope of obtaining professional advancement and promotion, and that he succeeded in that object; or that the Government, in the hope of securing a gentleman of Mr. Seymour's attainments and position as the representative of a large commercial borough like the town of Sunderland, had given him office in the one instance and promotion in the other, which they would not have given if he had not been a Member of Parliament; or does it mean to say this: "You (Mr. Seymour) were at the best a doubtful adherent of the Government; you were very likely to go against them, and would probably have gone against them on some occasion when your support was of importance; negotiations took place in the lobby of the House of Commons, and by means of those negotiations, and by reason of your agreeing to support the Government, you got a promise, which was afterwards realized, of the Recordership of Newcastle, in the one case, and of the rank of Queen's Counsel in the other." If that is what is meant, I own I cannot help thinking (and you will probably think) it is a very serious charge to make against any one. Although a man may fairly say, "While I support the Government, if I, *cæteris paribus*, am as good as another man, that gives me a title to a preference;" and there are many honorable men who think that not inconsistent with political integrity and honor; there are others who think it is fatal to the independence of Members of Parliament and to the best interests of the public. That is a matter on which there are grave differences of opinion; but to say that a man entertains an opinion on a particular subject which would induce him to speak or vote against the Government of the day, and that then those who deal with and manage the delicate subject of winning members to vote one way rather than the other, enter into negotiations with him in the lobby and, he being a man of plastic political morality, secure his adhesion by promising this or that, or by holding out little inducements of this or that kind, and get him to vote in a way in which he would not vote otherwise, that appears to me (though it is a subject for you to exercise your judgment upon and not for me, except so far as I can help you by pointing out what are the considerations which arise) to be a matter involving a grave charge of political dishonor and dishonesty. If the meaning of the observation is, that Mr. Seymour corruptly sold himself to the Government, you ought, certainly, to treat it as libellous matter, and as a thing beyond the province of a journalist or a public writer to assert, unless he is prepared to prove it. Mr. Digby Seymour has

been examined with reference to these matters; he was cross-examined especially respecting his appointment to the Recordership; the office was offered, in the first place, to Mr. Atherton, a gentleman of very high distinction on the Circuit; in fact, one of the leaders of it, and now her Majesty's Attorney-General. Mr. Atherton did not think it worth his while, in his position, to accept it; he did not think it worth the trouble of a contested election which it would have involved, and therefore he declined it. Then, it is certainly rather a significant fact that one of the gentlemen discharging the duties of a whipper-in, should have been speaking in the lobby to Mr. Seymour on the subject of the Recordership, and saying, that if Mr. Atherton refused it, he (Mr. Seymour) probably would have it. On the other hand, if the language used in this article bears the character and complexion to which I have referred; if it means to assert that there was a corrupt bargain on the part of Mr. Seymour, there is, in the first place, no attempt to put a justification on the record, as has been pointed out to you by the learned counsel for the plaintiff; and, in the second place, it is for you to say whether or not an observation of that kind made by a gentleman in the position of Mr. Berkeley was anything more than an observation made by a member of the Government, who having probably been informed that Mr. Seymour was an applicant for the Recordership of Newcastle, said in a friendly way, and as a pleasing piece of information, that a gentleman to whom the appointment had been offered had refused it, and that therefore there was reasonable ground for expecting that Mr. Seymour might obtain it.

With these observations I will leave that part of the libel, as to which it is admitted that a public writer may fairly enter upon the discussion of subjects of this kind, as being of a public nature affecting the character of a public man. Are you of opinion that the writer has kept within the true bounds and limits of his right and duty as a public writer, or is an assertion here made, reflecting on the character and honor of Mr. Seymour, which is without foundation? If so, Mr. Seymour would be entitled to your verdict for whatever you may think reasonable in respect of that charge.

But I entirely agree with my learned brother, that that is not the important and prominent part of this question; and I cannot help thinking, that however much may have been made of it, if that had been all, we should not have heard of this action, and that the really stinging part of this article is that portion of it which relates to the charges which were made the subject of inquiry, and afterwards the subject of animadversion before and by the Benchers of the Middle Temple.

Now, it becomes very important to see how the case is put in the article; whether new facts are stated, or whether the writer pro-

ceeds upon the facts as stated by the Benchers in their judgment. Before entering, however, upon that part of the inquiry, I must here observe upon what fell from Mr. Lush as to the legal position of the parties with reference to this part of the case; namely, that although the conduct of a public man is open to public discussion, his private conduct is not; and that it does not lie in the mouth of a man who has attacked another with reference to his private conduct to say, "I did it only in the fair discharge of a public duty." But there is this distinction in this case, that however true that proposition may be with reference to the private conduct of a private individual, Mr. Digby Seymour does not occupy the position of a private individual, nor is it as a private individual that these charges were made the subject of inquiry before the Benchers of his Inn. Mr. Digby Seymour is a barrister, and as such is subject to the jurisdiction of the domestic forum of the Benchers of his Inn; and I take it to be beyond dispute, that if the conduct of a member of an Inn of Court is such as to be unworthy of a gentleman and a member of the profession, he is within the jurisdiction of that forum. We hear of charges in the army of conduct unbecoming an officer and a gentleman, and although there may be no breach of military discipline, yet the breach of individual honor is held to be a sufficient ground for inquiry, and for such animadversion as the case may call for. In like manner, if the conduct of a member of the Bar is such as to be unworthy of a barrister, and unworthy of a gentleman, that again is always considered to be a proper matter to be inquired into by the Benchers of an Inn of Court. Upon that ground it was, and upon no other, that these matters were made the subject of inquiry. Now, why is it that the Benchers of an Inn of Court have this jurisdiction? Partly for the protection of the profession, and partly for the protection of the public; that the profession may not be disgraced by having enrolled among its members persons who are a dishonor and a discredit to it, and partly that the public, who consider (as you have been truly told) the rank of a barrister a sufficient test of the trustworthiness and honor of an individual, may not be misled and deluded by such a belief, if his conduct be really such as to disentitle him to their confidence; and therefore I cannot help thinking, that if the conduct of a barrister is brought under the notice of the Inn of Court to which he belongs, and they think it necessary to pass a public censure upon him, in respect of conduct which they consider discreditable and wrong, that is a public matter which may very fairly be inquired into and discussed as a subject of public interest, because the professional conduct of an individual member of the Bar is a matter of public concern, inasmuch as it is in that professional character that he is brought into contact with the public, and trusted by those who have their own interests to defend or to protect, and who employ him for that pur-

pose. But that is not the only matter in this part of the case which deserves attention. Mr. Digby Seymour was not only a member of the Bar; he was not only a member of the Bar who had been (I think during these proceedings) promoted to the rank of Queen's Counsel, but he was also one of the Judges of the land. He was a Recorder, having not only civil but criminal jurisdiction; trying men for offences against the law, and deciding questions of private interest and property, which came under his cognizance as a civil judge. He was subject to removal if his conduct was such as to render him unworthy of his office; at least that, which is an open question which has lately been raised, might be the subject of discussion. Under these circumstances it appears to me impossible to say that he was not a public man, and that his conduct, if it had reference to his fitness to be a public man, and to occupy a public position, was not a matter fit for discussion. Let me suppose that a judge who is to enforce the law by administering it, violated it, and committed some act against the law; or let me suppose that in the course of some trial it appeared that the judge had himself been wanting in integrity and honesty, would it not be competent to a public writer to discuss that conduct with reference to the propriety and fitness of the individual to hold the office which he might happen to occupy? It seems to me to be impossible to answer those questions in the negative, and I therefore must dissent from the proposition, that where a man holds a public position in which integrity, honesty, and honor are essential and indispensable qualifications, if, in his private conduct, he shows that he is destitute and devoid of those essential qualities, that is not a fair subject for public animadversion and hostile criticism, so long as the writer confines himself within the bounds of truth, and within the limits of fair and just observation. I cannot, therefore, go along with the learned counsel for the plaintiff, in saying that the matters which were discussed, inquired into, and disposed of by the Benchers of the Middle Temple were not matters which, looking to the position of Mr. Digby Seymour, whether as a member of the Bar, as a man in public political life, or as a man occupying a judicial position, might fairly be made the subject of discussion. But then the question is, whether the comments which have been made have been kept within those bounds by which they must reasonably be confined. What is it that this article alleges? It states, so far as I understand it, no facts as regards the proceedings before the Benchers, but it sets those proceedings out, and makes certain comments upon them. It begins, by way of introduction to the proceedings before the Benchers, with this language:—

"It is an extraordinary and, we believe, an unprecedented fact, that a barrister should be arraigned before the Benchers of his Inn

for improper conduct at the very time when the Crown has been induced to raise him to the superior rank of the profession. Yet this, we understand from his own lips, was the case with Mr. Digby Seymour; and the language employed by the Benchers in their judgment, forbids us to hope that the inquiry before them was either unjust or uncalled for. We are precluded, in common with the rest of the public, from ascertaining the exact nature of the evidence adduced against Mr. Seymour; and we conceive that the Bench of the Middle Temple have acted unfairly towards the Bar, as well as unwisely as respects themselves, in withholding a full report of the accusation and the proceedings thereon. That any injustice, however, can have been done by this silence to the accused, we can hardly bring ourselves to believe; for inasmuch as Mr. Digby Seymour is in possession of the whole evidence, and could give us the benefit of a total disclosure of all the circumstances of his trial, thereby putting himself right with the public, if the facts admit of his doing so; and as, notwithstanding occasional promises of such a disclosure, he remains silent, the only reasonable conclusion at which we can arrive is, that he does not consider the publication of the whole truth as likely to improve his position. All we can do under these circumstances is to place before our readers, at one view, the various documents that have been made public on the matter, and to collect, as far as possible, the scattered gleams of light that have fallen from time to time on the dark shadows of this remarkable case. We will only premise in doing so, that whatever publicity the scandal may now have attained, is owing to Mr. Digby Seymour himself, as the Benchers had maintained an absolute silence up to the time when his speech to his constituents, on the 4th of February last, was reported in the *Times* newspaper."

Then passing over the speech, there is set forth the judgment of the Benchers of the Middle Temple. Now it is quite impossible not to feel that that judgment casts a very severe censure on Mr. Digby Seymour; but I think this observation must be coupled with it, that nothing is added to the facts which the judgment of the Benchers sets forth. The writer of this article does not profess to add any facts with reference to these particular matters which were the subject of inquiry, but sets out the judgment of the Benchers in the exact terms of it; and if Mr. Digby Seymour had, for the first time, seen this judgment in print in this magazine, if—the sentence having been read to him in the parliament chamber of the Middle Temple, in the absence of every one except the members of his Inn—the writer of this article had, by some means or other, got it, and had given forth to the world that which the Benchers, out of consideration for Mr. Seymour, had not intended to be pub-

lished, Mr. Seymour might have had a fair ground to say, "You have done me a serious injury, by publishing a sentence, which, though it condemns me in terms of severity, was never intended, by those who passed it, to be made public to the world." That, however, is not the position in which things stand. Unfortunately, Mr. Digby Seymour went down to his constituents at Southampton, and there found that, somehow or other, what had passed in the parliament chamber had oozed out. The writer of this article is not responsible for that. Mr. Digby Seymour's political enemies at Southampton made (to use a hackneyed expression) "capital" of this judgment which had been passed upon him; and when he got to Southampton, he found placards stuck about, suggesting questions to be put to him, as to what had passed in the parliament chamber of the Middle Temple; and the result is, that Mr. Digby Seymour, acting under the impulse of the moment, (I do not desire to animadvert upon it to his disadvantage,) gives publicity to the whole thing himself. He makes a long and violent speech; he comes back to London; he writes a letter to the *Times;* he writes a protest to the Benchers, and sends the whole matter for publication. The writers of this article, therefore, cannot be complained of as having been the first to give publicity to the charges which had been made against Mr. Seymour, and to the censure which had been passed upon him by the Benchers; but they do this—they give those charges, they give the sentence, and then comment upon them, certainly, in severe terms; but it is for you to say whether the severity of the comment is not borne out by the severity of the censure. But they do more; they insert all the documents which have appeared, so that their readers may judge for themselves: they insert all the documents to which publicity had been given in the whole course of the proceedings subsequent to the sentence of the Benchers; Mr. Digby Seymour's letter to the *Times*, Mr. Digby Seymour's protest to the Benchers, Mr. Digby Seymour's speech to the electors of Southampton, are all set forth *in extenso* in this article. So far, therefore, as relates to that part of the matter, I am at a loss to see of what Mr. Digby Seymour could fairly complain. If we once arrive at the conclusion that this was matter which might be fairly brought before the public on the ground of Mr. Seymour's position as a member of the Bar, and as a person holding a judicial office, to say nothing of his occupying a political position as a Member of Parliament, it is difficult to see how they could have been brought before the public in a more fair or just manner than they have been, barring an observation appended to these documents after they have been given in detail, to which I shall call your attention in a moment. Well, they give the whole, and then they make their comments. Now, before you can form a proper estimate as to whether those comments are fair

and legitimate, as being made by a public writer on a public man, with reference to a matter of so much moment as these charges before the Benchers, you must see what the charges are, and what are the terms of the sentence pronounced by the Benchers. Unfortunately, except so far as you can collect from the documents produced and put forward to the public by Mr. Seymour, and the sentence of the Benchers of the Middle Temple, you have not the charges in any precise and intelligible form before you at all; but certainly you find that, according to the terms of the sentence of the Benchers of the Middle Temple, there was, in their opinion, very grave cause for censure and animadversion in the conduct of Mr. Seymour, in the matter of the charges that had been brought against him. Now, really, I think that in order to see whether the writer of this article has had his mind imbued with a spirit of hostility, and bitterness, and malice towards Mr. Seymour, you ought to consider the position in which Mr. Seymour stood; because you must do justice to both sides. One can quite understand that Mr. Seymour may have been wounded and pained by these animadversions; and yet, on the other hand, you must consider how far a public writer, dealing with a question of this kind, is, or is not, entitled to take the sentence which has been pronounced, as the basis on which to found the observations he is about to make. This is the sentence: —

"The Masters of the Bench have carefully considered the voluminous evidence and documents which have been brought before them, and have come to the conclusion that the charges in the case of 'Parker,' 'Coutts,' and of 'Robertson,' respectively, are not proved; and that the charge as to a proposal to hold briefs for an attorney in liquidation of his costs payable by you, is proved. The facts and circumstances which are disclosed fully satisfy the Masters of the Bench of the necessity for this inquiry; and they regret to add that they cannot accompany their intimation to you of their decision on the three charges first named with any declaration that your conduct is not liable to censure; on the contrary, they have the painful duty to perform of stating to you that they find much worthy of severe condemnation, even on the most favorable construction of your actions; that, in Parker's case, on your own statement of your conduct evidence appears of a want of open dealing towards, and of concealment from, Mr. Parker. Mr. Parker's agreement with you, on your own version of it, was inconsistent with your substitution of your credit for the money you undertook to add to his own, and with the use of his money for any purpose unconnected with the printing scheme. The breach of your agreement in these two respects was not communicated to Mr. Parker, whose consent alone could have justified the course to

which you actually resorted. The Masters of the Bench are also under the painful necessity of declaring their opinion that the settlement of Mr. Parker's action, while the charges of fraud included in it were, in the opinion of the Bench, not only not withdrawn, but were strongly re-asserted, as it was conduct calculated to destroy character by exciting suspicions that charges which were not boldly met could not be gainsaid, was an arrangement to which a right-minded man, even in the hour of heavy pecuniary distress, would not have submitted. They are compelled to add that no solid ground presents itself on the evidence in justification of the affidavit which was made by you for the purpose of postponing the trial of the action in question."

Then there are observations which are not of the same importance with regard to Captain Robertson's case; and then they come to the matter relating to the offer to an attorney to pay that attorney's costs by accepting briefs, on which the fees were not to be paid, but were to go in satisfaction of that attorney's claim. The Benchers say:—

"It is conduct, therefore, promoting deception, and likely to generate suspicion where confidence should prevail. If such a practice were tolerated, it would lower the character and honor of both branches of the profession, and would be injurious to the public, not only by reason of such debasement, but also by its tendency to introduce into, or maintain in the practice of their profession, men more distinguished by the pliancy of their principles than by the gifts of nature improved by an industrious and honest pursuit of eminence by honorable means."

Now it is impossible, as it strikes me, to read that sentence, and not to feel that it does carry with it condemnation and censure of a very serious character indeed; it suggests that Mr. Seymour, having received money from Mr. Parker for some purpose common to them both, applied and appropriated that money to his own use and for his own purposes, as well as the other matters which are adverted to in the course of that sentence. Now if that was so, and Mr. Seymour was in the position of a public man, whose character, although with reference to his private transactions, if thought inconsistent with his public position, was open to animadversion, and the censure of the Benchers is given in the terms in which it had been pronounced, and in which it had been made public to the world, is that a fair matter of complaint? That, I think, would depend upon the circumstances in which it is dealt with. If to the facts stated by the Masters of the Bench, the writer had added facts of his own, he would, undoubtedly, have been responsible for those facts; but if he merely comes forward and says:—"Here is a censure, pronounced by a tribunal of competent authority, made

public to the world, affecting the character of a public man; we bring it forward and say that the man on whom that censure has been passed, and who takes no step to vindicate himself, either by publishing the evidence, and thereby showing that the judgment was fallacious, and ought not to have been pronounced, or by an appeal to a superior jurisdiction, is open to public animadversion, and is not fit to occupy the position of a barrister, or the position of a judge, or the position of a Member of Parliament"—Is there anything in that calumnious, or libellous, or beyond the legitimate scope of a public writer? That is a matter for you to consider. You will be very much influenced, I doubt not, by the comments which are made on such a sentence thus given forth to the world. I have already read to you what they say with reference to the contest between Mr. Digby Seymour and the Benchers, as to whether his protest or their sentence ought to have credence given to it; and they say that, until Mr. Digby Seymour takes some step to vindicate himself effectually from the judgment of the Benchers, they must take that sentence to be in accordance with the facts which were before them. Having set out the judgment, and Mr. Digby Seymour's letter and protest, they make these observations, to which I will now ask your attention.

"It is not our intention to enter into any consideration of the specific charges brought against Mr. Digby Seymour, because, like the rest of the public, we are not yet in possession of the means for deciding on their impartiality with a full knowledge of the facts. When we consider that we have on the one hand the deliberate opinion of a number of honorable and distinguished men who have gone fully into the case, and on the other the bare assertion of innocence by an interested person, who declines to take the plain course of publishing a complete statement of the circumstances, and that person one who publicly stated that the Benchers had given a verdict in his favor, when he held their condemnation in his hands, we cannot hesitate for a moment as to the verdict we must pronounce. Until Mr. Digby Seymour has shown to the public, by a full and ungarbled publication of the evidence given before the Benchers, that their judgment was unjust, we must continue to believe that it was delivered in accordance with the truth, and that the censure therein was merited. Nor is our conviction in the slightest degree shaken by Mr. Seymour's claim to 'a crown of martyrdom,' or by his continually repeated, and never redeemed promise of placing himself right before the world by a public vindication. The last time he has had recourse to this expedient, now thoroughly worn out, was on the 4th of April last, in a letter to the *Times*, which we extract here:"—

I do not read the letter in the *Times*, but I go on with what they say—

"The statement which appeared in the newspaper referred to by Mr. Seymour was certainly incorrect."

That relates to the proceeding before the Northern Circuit; it is as to their not having expelled him from the Bar, but simply from the Bar mess. Then, having discussed that, they come, at last, to the question of the conduct of the Benchers; and upon that they pronounce a very strong opinion adverse to that body. That is not the subject matter of inquiry to-day; nor do I desire to express any opinion upon it myself; I therefore pass it over.

"We cannot, however, concur in the idea that investigations before the Benchers into the conduct of every accused member of the Bar should necessarily be held in public. The adoption of such a rule would, we think, be a great evil. The jurisdiction of the Bench is exercised in what has been justly termed 'a domestic forum,' and the nature of such a tribunal is essentially different from that of an ordinary court of law. To parade questions of etiquette, and even of morality, before the public, would be often unjust to the accused, and would add no security to the discipline of the profession. But we are alive to the mischief occasionally produced by the present practice, especially when an unscrupulous man makes capital out of the very privacy which has alone saved him from utter ruin. Perhaps it would be well to give to the accused in all cases the option of a public hearing."

Now those are the observations made upon the sentence of the Benchers of the Middle Temple. I have already pointed out to you that no exception can possibly be taken to the manner in which the defendant, or the writer of this article, for which the defendant is responsible, brings before the public the various documents, from the sentence of the Benchers down to the last letter and protest published by Mr. Digby Seymour. They are all set forth in this article, and I do not myself see that there is any attempt to add any facts in addition to those stated by the Benchers in their sentence, with reference to these charges which formed the subject matter of inquiry before them. Then the writer proceeds with his comments, and says:—"True it is that Mr. Seymour protests; true it is that he denies the propriety of the censure which has been pronounced upon him; but until he takes the course which is open to him for his self-vindication, by bringing before the public the whole of the evidence which was taken, and of which he is in possession, so long as there is nothing but his contrary assertion to meet the sentence which has been pronounced upon him, so long we shall take the liberty to believe that that sentence is well founded, and that the facts upon which it proceeds are to be taken to be true."

It is said that the defendant has not justified; that is, that he has not put upon the record a plea that all the matters referred to in

this sentence were true. I own I think there is great force in the observations of the learned counsel for the defendant as to that; take, for instance, the case of a man occupying a high public position who might be charged with some offence and be brought before a jury of his country for trial, and a verdict passes against him; take the case of a man whose conduct is involved in some judicial inquiry, even in a civil suit, in which he is plaintiff or defendant, and in which it transpires that his conduct has been unbecoming, not only of a public man, but of a private individual; a sentence is passed, or a verdict is given against him, and a public writer, assuming that sentence to be well founded, or assuming that verdict to be right, comments upon that which has become matter of public notoriety and public observation:—"I do not assume the facts; I do not state them to be so, but I state that this individual, upon whose public character I am now commenting, has been found guilty of a specific offence, or has been declared by a verdict of a jury to be a dishonest man, because he has not paid his debts." The writer comments on that which, for the present, is taken as an admitted and ascertained fact; he may qualify his observations by saying, "What I say is open still to this,—that the individual thus circumstanced may have his sentence reversed, or may have the verdict which affected him set aside; but upon the assumption that there has been a sentence or a verdict pronounced by a tribunal of competent jurisdiction and authority, I make my observations." If the matter is within the province of a public writer to discuss, what say you; Is he justified in assuming that that which has been pronounced by a competent authority is to be taken as a fact, at all events until the contrary should be made to appear, or, if he comments upon that which has thus become public property, is he to be held responsible in an action for libel unless he is prepared to take upon himself the burthen of proof, although it may involve him in an inquiry of great magnitude, expense, and difficulty? That seems to me to be the proposition contended for by Mr. Lush. It was competent to the defendant, they say, to put a plea of justification on the record, and establish the truth of the facts alleged by the Benchers in their censure; in short, to prove to your satisfaction that the sentence pronounced by the Benchers was a proper sentence. I do not know whether you will entertain that view of the matter. The question, as it seems to me, for you to consider is, whether the observations which have been made upon this subject are or are not within the sphere of legitimate and proper observation, or whether the writer of this article has imported new facts, or drawn unwarrantable conclusions from the sentence that has been pronounced by the Benchers adversely to Mr. Seymour.

Now, gentlemen, having got so far, we are in a position to refer to the opening observations which have been so ably commented

upon oy Mr. Lush on the part of the plaintiff; and certainly the language used in the article is very strong, and one cannot but regret that a public writer, even if acting within the proper scope of his employment and duty, should not have been more guarded and more moderate in the expressions he used. At the same time, it is certainly open to the observation made by the learned counsel for the defendant, (who addressed to you one of the most eloquent speeches it has ever been my lot to hear in this Court,) that the writer of this article did not proceed to attack Mr. Digby Seymour until Mr. Digby Seymour had attacked the Bar of the Northern Circuit; and certainly a man who comes into a court of justice to hold another responsible for a hostile attack upon himself, should, in order to entitle himself to the most favorable consideration of a jury, appear before them with reference to the subject matter of inquiry as a man who has not been unnecessarily and wantonly lavish in animadversion and abuse on others. Now how does Mr. Digby Seymour present himself before you? He goes down to Southampton, and there he is provoked into a sudden and not unnatural fit of temper and indignation, by finding that that which was intended at all events to have been a private censure passed upon him by the Benchers of the Middle Temple had been bruited abroad, and had been made use of by his opponents, and was about to be flung in his face before a public assembly of the electors of Southampton. If he had complained of that being done,—if he had sought simply to defend himself, and had said, "These are matters which ought not to be gone into because they are concluded by what passed before the Benchers, or if they are gone into at all it should only be by the publication of the evidence, or by an appeal to the judges, if the thing is open to appeal"—if he had confined himself to that, I quite understand that he would have done no more than it would have been natural for any man to do under the circumstances; but he goes further, he makes attacks upon the Bar, and upon the Benchers of his Inn, which I have no doubt when the writer of this article sat down to pen it were present to his mind, and which provoked a certain amount of indignation against Mr. Digby Seymour, not unnatural in the writer of this article, who, I think, without in the most remote degree knowing who he was, we may pretty fairly assume to have been a member of the Bar. Now he goes down to Southampton, and he makes this speech:—

"Gentlemen, I have now been nearly sixteen years at the Bar. I never won a laurel and never obtained a promotion without a severe and arduous struggle. I came among the members of the Northern Circuit with that misfortune which my countrymen, Grattan, has described; I came 'with the curse of Swift upon me;' I was an Irishman. I was made from my earliest time the mark of a cruel and

jealous opposition and a determined effort to keep me down if it were possible. But, gentlemen, their efforts failed. Step by step I vanquished one difficulty and another, and won by degrees the honors which I have received, and the dignities which I hold. I obtained a lead at my sessions; I obtained the best Recordership but one on the Northern Circuit; I obtained my rank a short time ago from two judges, themselves formerly members of the Northern Circuit, of Palatine precedence at Liverpool; and finally, notwithstanding all my traducers—ay, and, at the very time when detraction was doing its worst, I received the rank of her Majesty's Counsel from the hands of the late Lord Chancellor Campbell."

Then he says, with reference to the charges which had been brought against him before the Benchers of the Middle Temple:—

"Gentlemen, the charges, as they are called, which were brought against me, arose out of matters, the youngest of which is seven years old, and the others dated back actually to ten years ago. The men who instigated these charges never showed their faces—my real accusers never appeared; but, beginning with the efforts of a few individuals on my own Circuit, scandals were whispered about, which at last, by some means or other, which I have not been able as yet to detect or expose, led to the investigation by the Benchers of my Inn."

Then he says:—

"I have gone over the various points which, fairly or unfairly, have been pressed upon your attention, and upon which I have come down, though late, to Southampton, in the honest hope that I might receive from you a verdict, such as would tell at once to the public, that whatever cruelty I have encountered elsewhere," (that must have referred either to his own Circuit or to the Benchers by whom the charges against him had been investigated,) "however the dirty fingers of certain members of my own profession have been employed in raking up the scandals of the past for the purpose of dragging up something to damage my repute, yet that you sympathized with your representative, that you accepted the result, that you saw me still the member of an honorable profession, in spite of malice and jealousy, and of politicial hate, still holding the rank, which, by such hard struggles, I attained; and that you would by your determination, and by your pronounced opinion to-night, trample forever upon this cruel attempt to call public attention to a matter which, hitherto, at least, has been confined to a more limited circle, and has never yet been brought forth and laid before the glare of public day."

Now, gentlemen, it is impossible not to see that Mr. Digby Seymour is there charging the Bar of the Northern Circuit with having set their faces against him from the earliest time of his becoming

an active member of his profession on that Circuit; that they did that from the mean and miserable motive of keeping out an Irishman from fair competition with themselves; and that, having failed to prevent him from competing with them and succeeding amongst them, certain members, at all events of that Circuit, have put forth scandalous charges against him — have had recourse to mean and despicable contrivances to injure his character, to prevent his success and promotion, and to crush him. Now, your attention has been very properly called to the fact, that, on the Northern Circuit, at the time when Mr. Digby Seymour joined it, there were four or five Irishmen standing high on that Circuit, and distinguished among the distinguished individuals there. Mr. Baron Martin, Mr. Justice Hill, Mr. Baron Watson, Mr. Serjeant Murphy, and others, whose names have been adverted to, were all members of that Circuit; and to say that any Circuit like the Northern Circuit would set their faces against a man because he was an Irishman, is an assumption which I hope and trust, though Mr. Seymour may have labored under some such hallucination, no man of common sense would ever entertain for a moment. Some of the most distinguished individuals who ever adorned the Bar have been Irishmen; some of the most distinguished members of it at the present moment are Irishmen; and I am quite sure that if they were asked, they would not tell you that they had ever met with anything but a generous rivalry on the part of Englishmen. Mr. Seymour may have deceived himself with this notion. A man sometimes gets into an unpleasant position with those with whom he is called on to associate: it is the consequence very often, of accident or misunderstanding; and the result is, that instead of attributing it to his own fault, his own want of manner, or his own want of powers of conciliation, he ascribes it to jealousy, envy, rivalry, and all sorts of sinister motives. He deceives himself. But if he makes these charges against others, and puts them forward in that way imputing to them unworthy and scandalous motives, he must not be over sensitive, if he is attacked himself. But it does not remain there. Mr. Seymour had this case inquired into before the Benchers of the Middle Temple. Having heard the names of the gentlemen who sat upon the inquiry, as to whom I I need not tell you they are some of the most distinguished members of the English Bar, can you conceive that those gentlemen were actuated by any other desire than that of doing their duty honestly and fairly? Yet, what was the course that Mr. Seymour pursued? Waiving, as he tells you he did, all objection to the constitution of the tribunal, when his own attention was called to the fact, that on one occasion the numbers were not complete; instead of saying, when, at all events, upon the ninth meeting, he was aware of the fact, that the numbers ought always to be

kept up to a certain point, "I object to your going on, for on more than one occasion the same members have not been present, and I do not think that reading the evidence is the same thing as hearing the witnesses;" he waives the objection, and goes on with the inquiry. The evidence is all taken, and the case is ripe for decision. Even then it was still open to Mr. Seymour to take the exception that he took afterwards, and he might have said, "Your tribunal has been irregularly constituted, and I object to members who have not been present throughout all the details of the proceeding passing sentence one way or the other." He does no such thing, however; he awaits the sentence, and yet, although there is a judgment of acquittal as to the main charges, there being appended to the judgment or sentence a censure upon Mr. Digby Seymour, Mr. Seymour sends in a protest, and he also writes to the *Times*, and publishes the sentence; and then we must see how far in these papers which he afterwards publishes, he provokes, by his own animadversion upon the motives and conduct of others, hostile and severe animadversions upon himself. He writes to the *Times*, and he begins thus: —

"The Benchers of the Middle Temple are pursuing to the last the same course they adopted towards me from the first." What does that mean? "They have 'screened' and published their 'judgment,' but they have thought proper to suppress my protest. I appeal to you to supply this significant omission, and request you will publish the documents I enclose. There are other grave matters between myself and the Bench, not detailed in this protest, which the publication of the whole proceedings will reveal to the eyes of the profession and the public. I say of 'the whole proceedings,' because the printed report furnished to me is not complete. It does not contain all the 'evidence' and 'proceedings' of the tenth meeting. It does not contain the whole of the documentary evidence put in by myself or my Counsel, Mr. Lush, Q.C. It does not contain the names of the Benchers who voted for or against the various portions of this judgment. This is no longer a case for any half publicity. I am now, by the very act of the Benchers themselves, entitled to have what I demand — the whole truth made known, ungarbled and unabridged."

Then comes the protest, which is also sent to the *Times*, and which is in these terms; in the first place it goes through the different cases, commenting upon those cases and excepting to the observations or judgment pronounced by the Benchers respecting them. Having done that at considerable length, he appends this:—

"Upon the last paragraph of your judgment, I wish simply to say that I think, having frankly admitted an error, these observations might have been spared," (that is with reference to his not

taking his fees,) "the more so as the Bench must bear in mind that I was placed, as regarded Mr. Brown, in the difficult position in which honesty pointed one way and etiquette another. There is another subject to which I feel bound to call your attention. You have held fifteen meetings, and in no single instance has your parliament been composed a second time of the same members as any previous parliament. In point of fact, therefore, I have been tried before fifteen different tribunals. Your numbers have been equally irregular, varying from a maximum of eighteen to a minimum of seven. One of your number first attended at the fifth meeting, one first at the sixth, two at the ninth, two at the tenth, and one at the thirteenth. The following is an analysis of the attendance of all the Bench."

Then he goes through the analysis. And then he says:—

"Here is certainly a remarkable disregard both of the spirit and letter of the wise rule of the society which requires the attendance of the same members on every adjourned hearing of an inquiry into an accusation against a barrister. I have no right to penetrate the secrets of your chamber, but I confess I should like to know how many of those who heard the evidence of Mr. Parker and his witnesses took part, and if so, what part, in framing or supporting the observations made with reference to that case. I appeal to those members of the Bench who were present at the third meeting, whether the mode in which the evidence of Mr. Parker especially was given, did not strongly impress their minds with the impossibility of seriously regarding it. The perusal, more or less careful, of printed evidence (even were it of the most accurate character) can never supply the place of opinions derived from the hearing of the witnesses themselves; and I cannot help feeling that I have been hardly dealt with if members of the Bench who have only formed their conclusions upon the printed reports, intermixed and confused as the various cases are, have joined in reflections which I firmly believe would not have been made, or would have been greatly modified had they attended the inquiry with greater regularity. It may of course be said that my attention was called to this rule, and that I ought, on subsequent occasions, to have made objections on the ground of its non-observance; but my attention was not called to this rule till as late as the ninth meeting, though it ought to have been mentioned on the second, and it is obvious that it would at that time have placed me in a most invidious attitude to have appealed to this rule with reference to any Bencher I might have objected to. I could not, moreover, for a moment have anticipated that members of the Bench, who had not heard the evidence as to any particular case, would have suggested observations, or even joined in a judgment, with reference to that case, of

the fairness of which they were not, from this very circumstance, in a proper position to decide. On this ground, as well as those I have before specified, I beg to enter my solemn protest against that part of your judgment which contains the observations of which I complain, and which I rejoice to know, have not received the unanimous approval of the Bench; and I request that this letter may be recorded along with the judgment."

He complains now not only of the tribunal and the irregularity of its composition, but he complains that his protest was not screened together with the judgment; and I must say I think that a more idle complaint never was preferred. In the first place, unless a man is going to appeal from a sentence I do not understand a protest. The Benchers were either a competent tribunal to deal with the matter, or they were not. If they were not, of course it was for Mr. Seymour to except to their jurisdiction, and say that the matter was not properly within it; but if they were, their sentence, unless reversed on appeal, is conclusive. True, if a sentence affects a man's character he has a right to say, "I will appeal to the public; and the mode in which I will appeal to the public is, by publishing the whole proceedings in the case, with such observations as I think I am fairly entitled to make upon the decision or judgment; but to ask the Benchers to screen this long protest at the same time as their judgment, I confess, appears to me to be a very unreasonable demand. Here, gentlemen, you have the whole of the proceedings before you, and I think you cannot help seeing that Mr. Digby Seymour did animadvert, both in his speech at Southampton, and also in this protest, and in his letters, very strongly upon the conduct and motives, not only of the Northern Circuit, but of the Benchers of the Middle Temple, before whom this inquiry was conducted. I see, also, that in his speech at Southampton he makes this observation upon the gentlemen of the Bench who were his judges.

"I was upon fifteen different occasions before the Benchers of my Inn, and I stood practically before fifteen different tribunals, because upon no two occasions were my judges the same. The examinations were conducted within closed doors. I would to God they had been conducted in the broad light of day, and before the face of my constituents and the country; they were conducted by men sitting down after dinner, varying in their numbers and attendance, and sometimes postponing the inquiry upon the most trivial grounds. But, gentlemen, whatever feelings were entertained towards me originally, there were many among those Benchers who, I believe, were men of the highest honor, imbued with the spirit of justice, and actuated by feelings of generosity; and to them mainly, and to their indignation at the monstrous wrongs

which I was enduring, I believe I owe at last the verdict, which even my interrogator will not deny has been given in my favor."

Now, it is quite clear from that, that he has made observations derogatory to the propriety of conduct, and the motives as well as the decision of the Benchers of the Inn, before whom this inquiry was conducted, speaking of them as men who, instead of holding their sittings by day, sat after dinner, came in and went out as was most convenient to themselves, did not attend to the proceedings as they ought to have done, and finally gave a judgment, (though there were honorable men among them,) many of them from unworthy motives. Those are serious charges, and I cannot help thinking that it would have been better, if Mr. Digby Seymour had been dissatisfied with this sentence of the Benchers, that he should either at once have had recourse to the straightforward mode of publishing the whole of the proceedings, leaving the public to form their own judgment, with any observations he might have thought it right to make, or that he should have tried what would have been the effect of an appeal to the Judges. You have been told something about his having been advised that an appeal would not lie. It is not for me to say whether it would or would not, because that question might have come before me in my judicial character as one of the Judges of this Court to decide; but I cannot help saying this,—that if he had taken the course of trying that question, he would, at least, have shut out the writer of this article from many of the observations which he has made use of; and it is for you, gentlemen, before you finally determine as to how far this language, to which I am about to call your attention, and which in general terms of sweeping censure denounces Mr. Digby Seymour,—how far much of that language, (if you should think it beyond the limits of fair and proper criticism, and therefore libellous, and that which calls upon you for a verdict in favor of the plaintiff,) may not have given rise to these observations, and provoked them, from a sense with which the writer's mind was imbued of the wholesale way in which Mr. Digby Seymour, in his defence against the effect of this censure of the Benchers, was sowing broadcast aspersions on men of the highest character and honor in the profession of the Law. Certainly the language is very strong, and I call your attention to it.

"Mr. Digby Seymour has lately informed his constituents that he was born an Irishman; but we should have thought that this information, to any one even slightly acquainted with the honorable member, was altogether superfluous. He likewise attributes to his nationality the bitter hostility with which, as he alleges, he was at first received, and has since been maligned and persecuted by his brethren on the Northern Circuit. He came among us, as he says, with 'the curse of Swift upon him,' and gives us to understand that

nothing but his unrivalled genius and purity of character could have enabled him to survive and triumph over this natal calamity. Whatever credence we may wish to attach to every statement conveyed in the mild and measured language of Mr. Digby Seymour, we must take exception to the idea that Irish birth constitutes any disqualification for professional popularity or success. An eminent Englishman, himself an ornament to his *alma mater*, when recently comparing in a public address the achievements of the various universities in the United Kingdom, paid a high compliment to Trinity College, Dublin; and as a proof of the rare training given at that seat of learning, he adduced, among other instances, the fact that no less than five out of the fifteen Judges occupying the Bench had received their education in that famous university of Ireland. We believe that only four out of the five are Hibernian by birth," (one of the five is my brother Crompton—although educated in Dublin, he is not an Irishman) "but so large a proportion of Irishmen in the highest judicial position, and the well-earned success of many others from our sister island in the ranks of the Bar, are proof enough that the career of the profession is fair and open to all the Queen's subjects. But it is only just to Mr. Digby Seymour to admit that there are two kinds of Irishmen, and that the cordiality extended to the one is by no means secure to the other. There is the Irish gentleman, generous, accomplished, and urbane—perhaps the highest type of the genus gentleman to be found in the United Kingdom. There is also the Irish blackguard; swaggering, foul-mouthed, and shameless; the most insolent of upstarts, the most unblushing of swindlers; never destitute of a quarrel, never at a loss for a lie. For as the Irish gentleman is of rare quality, so the Irish blackguard is consummate in his growth. Ireland is always great in extremes, more especially in her psychological productions. She has reared generals who have led their armies to certain victory, and she has reared also the tribe of cabbage-garden heroes. She has adorned our Parliament with splendid orators and consummate statesmen, and has afflicted it also with a breed of bawling demagogues and venal fools. And so it happens that this green and prolific island, with the singular versatility of her race, has supplied to the Bar of England some of its brightest ornaments, and some of its blackest sheep; bestowing on the former a learning and eloquence which Englishmen are proud to admire, and enriching the latter with a power of impudence, and a fertility in fraud, which defy all description as (to the uninitiated intellect) they pass all knowledge. Should one of this latter flock find his way to an English Circuit, it could hardly be considered a matter for legitimate surprise if he should become an object of suspicion and dislike, and '*hic niger est*' be the motto coupled with his name."

Now, I think it is impossible to shut one's eyes to the fact that all that has special application to Mr. Digby Seymour. It is much of it general in its terms, but it is evidently pointed to one individual. The distinction between the Irish gentleman and the Irish blackguard admits of easy and immediate application; and so does the difference between the consummate statesman and orator and the bawling demagogue and venal fool, though that is much less important. You may call a man a fool or a demagogue if you are so minded, but when you come to talk of the brightest ornament of the Bar in contrast with its blackest sheep, and the learning and eloquence which Englishmen are proud to admire, and enriching the latter with a power of impudence and a fertility in fraud, which defy all description, I must confess that that is language of considerable strength, and of considerable violence. Its meaning it is for you to determine. If it was meant by that, Here is a gentleman who has been compelled to submit to the ordeal of an examination before the Benchers of his Inn, in a matter touching most seriously his conduct as a man of probity and honor, and who has been the subject of severe animadversion and censure, arising out of those transactions, and then, not satisfied with bowing to the decision or appealing against it—not satisfied with the opportunity of challenging either public attention to the injustice of the sentence or appealing against it if an appeal be open to him, or submitting to it in a contrite spirit, with a determination to wash out the stain by a life of honor in time to come,—if instead of that he denounces those who passed that censure upon him as unjust judges actuated by sinister and unworthy motives,—if he ascribes the charges to the jealousy and hostility of a Circuit, or the members of it, who he says have persecuted him with bitter malignity and cruelty because he is an Irishman, we say that a man who under those circumstances adopts that line of conduct, is a man whom we may term "a blackguard, swaggering, foul mouthed, and shameless," and to whom may be justly applied the very strong language that is used in this article.

If you think that that is what is meant, you will make allowance for the language that is used, looking to the circumstances in which the writer was placed by the attacks which Mr. Digby Seymour himself had made on other people, and the way in which he had cast aspersions upon them. If you think that it meant more; that instead of being satisfied with saying "Here is a censure of the Benchers, we advert to that censure, and we say that Mr. Digby Seymour, unless he can get rid of that censure by showing that the evidence did not warrant it, or unless he can get rid of it by means of an appeal, must be considered as having been justly blameable to the extent to which the Benchers have blamed him, and if he was so, he is open to have it said of him that his character as a

public man has been tarnished, and to have the propriety of his position as a public man questioned," if going beyond that they take upon themselves to say, without warrant and without authority, that he is "fertile in fraud, and the most accomplished of swindlers," it is for you to say how far, under those circumstances, you may think him entitled to your verdict, on the ground that this writer has transgressed the bounds within which a writer canvassing the character of a public man ought still to be confined, or has made the opportunity available for the purpose of gratifying a bitter and vindictive spirit of hostility towards Mr. Digby Seymour. The matter is entirely one for you, gentlemen. If you think that in this case, instead of being a fair, reasonable, honest, and *bonâ fide* comment on the circumstances relating to Mr. Digby Seymour, this has been made the opportunity of gratifying personal vindictiveness and hostility towards him, and that the writer transgressed altogether the legitimate bounds, it will be for you to show your sense of that by your verdict. I quite agree with what has been said by my brother Shee, that this is no occasion on which to review and revise the sentence pronounced by the Benchers. You have not the materials before you. If that was Mr. Digby Seymour's motive in having recourse to this action, I think it is to be regretted that he should have resorted to it instead of taking some other proceedings in which the merits of the sentence might have been legitimately canvassed.

Gentlemen, the case is entirely for you. You will say whether you think this article contains matter which is libellous for which the writer, or those who are responsible for the writer, ought justly to be held liable. If so, you will say what damages you think are sufficient to compensate Mr. Digby Seymour for any injury he may have sustained; but you will not decide the question of damages, if you think that is a question which you are called on to entertain, without considering the circumstances of provocation which may have excited the indignation of this writer, and led him to apply to Mr. Digby Seymour language which, but for the attacks that that gentleman has made upon others, possibly never would have been used.

The jury retired to consider their verdict at half-past three o'clock P.M., and returned into Court at five minutes past five.

THE ASSOCIATE:—Gentlemen, have you agreed upon your verdict?

FOREMAN OF THE JURY:—We have.

THE ASSOCIATE:—Do you find for the plaintiff, or for the defendant?

FOREMAN OF THE JURY:—For the plaintiff.

THE ASSOCIATE:—With what damages?

FOREMAN OF THE JURY:—Forty shillings.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of New Hampshire.

Strafford, December Term, 1862.

In Equity.

JOSEPH H. SMITH, *et al. v.* JOHN T. GIBBS.

The sale of the good-will of a business will take from the seller the right to continue, or in any way hold himself out as continuing the identical business the good-will of which he had sold, but will not necessarily prevent him from engaging in a similar business that is not and does not purport to be a continuation of the old one.

The sale of a newspaper and subscription list and printing establishment together with the good-will thereof, will not exclude the seller from the right to publish a new and different newspaper, and in connection with his newspaper a new printing-office which is not a continuation of the old business.

Parol evidence is inadmissible to show that at the time of the sale, or during the prior negotiations, a verbal agreement was made by the defendant that he would not establish a competing business.

Evidence that by the usage among publishers and conductors of newspapers and printing establishments, a sale of the good-will and subscription list takes from the seller the right to establish a competing journal and printing-office inadmissible.

This was a bill in equity in which the plaintiffs complained against the defendant that

On the twenty-seventh day of July, A. D. 1858, and for a long time before, to wit, for more than thirty years preceding the said twenty-seventh day of July, A.D. 1858, the said Gibbs was, and during all of said time had been, the proprietor of the *Dover Gazette* printing establishment, located in said Dover, and the editor and proprietor of the newspaper called the "*Dover Gazette and Strafford Advertiser.*"

That the *Dover Gazette* printing establishment had a large, extensive and valuable patronage in said county of Strafford and chiefly in the city of Dover.

That the *Dover Gazette and Strafford Advertiser* was a political newspaper, advocating the principles of the political organization known as the Democratic Party, with a good subscription list, to wit, numbering twenty-five hundred subscribers or more, but depending for support mainly upon a limited local and political patronage, to wit, chiefly in the counties of Strafford and Carroll.

That the said printing establishment and newspaper were intimately connected, and to a great extent dependant each upon the other.

That on said twenty-seventh day of July, A. D. 1858, the said Joseph H. Smith and Joshua L. Foster and John T. Gibbs agreed together, the said Smith and Foster to buy, and the said Gibbs to sell, all the type, printing materials, papers of every kind, and all of the property owned by said Gibbs and belonging to the *Dover Gazette* printing establishment, in the *Dover Gazette* Building, on Central Square, in said Dover, at the appraisal of William Butterfield, of Concord, in our County of Merrimack, William H. Huse, of Newburyport, in the Commonwealth of Massachusetts, and Samuel C. Baldwin, of Laconia, in our County of Belknap, indifferently chosen by said parties, whose unanimous opinion in said appraisal to be final as to the value of said printing establishment, and to be rendered on or before the

first day of September then next, to the performance of which agreement the parties severally bound themselves each to the other in the sum of one thousand dollars, said sum to be regarded as settled and liquidated damages in case either party should fail to fulfil his part of said agreement.

That on the twenty-ninth day of July, A.D. 1858, it was further agreed by the said parties that the aforesaid appraisers, at the time they should appraise the property hereinbefore mentioned, should also appraise the then value of the subscription list of the *Dover Gazette and Strafford Advertiser*, and also the *good-will* of the *Dover Gazette* printing establishment, and the same forfeiture to attach for non-compliance with this agreement as hereinbefore set forth.

That on said twenty-ninth day of July, A.D. 1858, the said William Butterfield, William H. Huse and Samuel C. Baldwin met and proceeded to examine and ascertain in regard to said property, subscription list and good-will, and on the thirtieth day of July, A.D. 1858, they made award.

That having carefully examined all of the property referred to in the agreement and duly considered the whole matter, and heard the said parties, do award and decide that said printing establishment, with the presses, type, materials, property, subscription list, and good-will belonging and appertaining to the same, is of the value of Forty-eight Hundred Dollars.

That on the sixth day of August, A.D. 1858, the said John T. Gibbs executed a bill of sale, wherein he conveyed to said Smith and Foster the said printing establishment, with the presses, type, materials, property, subscription list and good-will belonging and appertaining to the same as appraised by said Butterfield, Huse and Baldwin, as by their award dated the thirtieth day of July, A.D. 1858, meaning to transfer and convey all of the right and interest the said Gibbs then had in the *Dover Gazette* printing establishment as then existing, and before that time carried on by the said Gibbs.

That upon the delivery of said bill of sale the said Smith and Foster paid to said Gibbs said sum of forty-eight hundred dollars as and for the consideration of said sale and transfer, and the agreement of said Gibbs hereinafter set forth.

That the said Smith and Foster took possession of said printing establishment, presses, type, materials, property, subscription list and good-will, have exercised and carried on the printing business and have weekly issued said newspaper, and continued it of the same political character, and have therein advocated the principles of the political organization known as the Democratic Party, from said sixth day of August, A.D. 1858, to the time of the filing this bill, and that they desire and purpose to continue in said printing business and to issue said newspaper, and to receive and enjoy the benefit, profit and advantage of said subscription list, and the good-will of said establishment.

That it was understood and agreed between said Smith and Foster and the said Gibbs, and was a part of the agreement for said purchase and sale, and so understood and estimated by said appraisers in making their appraisement, that the same Gibbs was fully and completely to relinquish and give up to said Smith and Foster the newspaper and printing business as then existing and before carried on by him the said Gibbs, and retire from the same; that he the said Gibbs was not to set up or engage in the printing business and newspaper business in rivalry or competition with the printing establishment and newspaper sold as aforesaid, either in Dover, the county of Strafford, or the territorial limits included within the circulation of the newspaper so sold, and that he was in no way directly or indirectly to hinder, interrupt, molest, withdraw or interfere, with the full, free and uninterrupted use, enjoyment, benefit, profit and advantage of the premises so sold and conveyed by said Gibbs in his aforesaid bill of sale, and as appraised by said Butterfield, Huse and Baldwin as hereinbefore set forth.

That according to the custom of the trade and business of printing establishments, and of carrying on and publishing political and local newspapers of the character of the *Dover Gazette* printing establishment and of the newspaper called the *Dover Gazette and Strafford Advertiser*, it is understood in the sale and purchase of such establishment and paper, with the subscription list and good-will, that the seller shall retire from the business and shall not directly or indirectly establish and carry

on a printing establishment or newspaper in the same place and situation, so that the said new printing establishment and paper shall be in rivalry or competition with the printing establishment and newspaper sold as aforesaid.

That the aforesaid subscription list and good-will made a large part, to wit, more than one-half of said forty-eight hundred dollars, as considered and appraised by said appraisers.

That the principal value of the paper and establishment depended upon said Gibbs withdrawing from and giving up said newspaper and printing business, and the good faith in which he kept and carried out his aforesaid agreeement.

That the great inducement for said Smith and Foster making said purchase was the aforesaid understanding and agreement on the part of said Gibbs, that without said agreement and understanding they would not have made such purchase.

That the actual expenses of maintaining said establishment were large and somewhat fixed, and subject to comparative little variation by the increase or decrease of patronage.

That two similar newspapers and printing establishments located in said Dover could not receive adequate patronage and support.

That the said Smith and Foster have on their part in all respects fully and faithfully executed said agreement.

That the said Gibbs and divers other persons at present to the plaintiffs unknown whose names when discovered they pray then may be at at liberty to insert herein with apt words to charge them as parties defendants hereto, under the firm of John T. Gibbs & Co. thereafterwards to wit, on the first day of April, A. D. 1860, issued a prospectus of a new paper to be issued by the said John T. Gibbs & Co.

That on the first day of May, A.D. 1860, the said John T. Gibbs set up in the city of Dover aforesaid, a printing establishment of the character of the *Dover Gazette* printing establishment as carried on by the said Gibbs previous to said sale and by the plaintiffs since said sale, and on said first day of May, A.D. 1860, issued a newspaper called the *Dover Sentinel*, of the same dress and general appearance of the *Dover Gazette and Strafford Advertiser*, as formerly issued by said Gibbs, and claiming to be of the same political character and to advocate the principles of the political organization known as the Democratic Party. That he, the said Gibbs, has continued since said first day of May, A.D. 1860, to the time of filing this bill, weekly to issue said newspaper, and has continued said printing establishment, that he has done much work and received the pay and profits of the same to a large amount, to wit, the sum of two thousand dollars, which otherwise and of right ought to have been done and received by the plaintiffs.

That on said first day of April, A.D. 1860, and frequently since, and to the time of filing this bill, he has issued advertisements wherein he solicits the patronage and support of his old friends and expresses the hope that he may receive their names to his subscription list; has, unsolicited, sent the *Sentinel* to many of his old patrons, and invited them to subscribe for the same; has been personally to the subscribers of the *Dover Gazette and Strafford Advertiser*, urged them to discontinue the *Gazette* and subscribe for the *Sentinel*, and when the subscribers of the *Gazette* have paid in advance has proposed to send the *Sentinel* free for the time they have thus paid in advance if they would discontinue the *Gazette* and subscribe for the *Sentinel*.

That the support of the two printing establishments and of the two papers depend and must depend upon the patronage and circulation in the same district of country and upon the same class of people. That the new establishment and new paper is in direct competition and rivalry with the old printing establishment and the old paper, and materially interferes with its patronage, circulation and profits, injures its business and greatly diminishes its value.

That after said sale, to wit, on the first day of January, A.D. 1859, the said Gibbs borrowed of the plaintiffs the original subscription list of the *Dover Gazette* as sold by the said Gibbs to the plaintiffs, and has since retained the same and refused to return and deliver the same to the plaintiffs although frequently requested so to do.

Wherefore said plaintiffs pray an account of the moneys received by the said

Gibbs for work done in said printing establishment so by him set up, and for subscriptions for said *Dover Sentinel*, and the amount charged for each and not yet received, and of all receipts and charges for and on account of his business so set up as aforesaid, and that it be ordered and decreed that said Gibbs shall pay the same when ascertained to the plaintiffs.

That said Gibbs shall deliver said subscription list to the plaintiffs.

That said Gibbs, his associates, agents, attorneys, aiders and abettors be strictly enjoined from exercising and carrying on the said printing business, and from issuing and circulating said paper called the *Dover Sentinel*, or any other paper in rivalry or competition with the business and paper so sold by him as aforesaid, within the county of Strafford, and also from permitting any other person or persons to carry on the same business for him, or on his account within said county of Strafford, and from selling and disposing of or leasing and letting his presses, type and other materials to any other person or persons for the purpose of carrying on the same or like business within the county of Strafford aforesaid, and from doing any other act in violation of and inconsistent with said agreement and understanding as aforesaid with said plaintiffs, and that they may have such further and other relief in the premises as justice may require.

The answer admitted the allegations in regard to the proprietorship and character of the newspaper and printing establishment; the sale and delivery of the same to the plaintiffs; but denied that they continued the newspaper of the same political character as before the sale and transfer, on the ground that it opposed the democratic national administration. The answer also denied the alleged understanding and agreement, that the defendant was not to engage in any rival or competing business, and also the custom of the trade and business of printing establishments, set up by the plaintiffs; and also that by the sale of the good-will of the business, he had excluded himself from the right to establish and carry on a business similar to that which he had parted with, &c.

The referees or appraisers agreed upon to appraise the value of the *Dover Gazette* printing establishment, &c., awarded and decided "that said printing establishment with the presses, type, materials, property, subscription list and good-will belonging or appertaining to the same, is of the value of forty-eight hundred dollars," and this property as appraised was conveyed by the defendant to the plaintiffs for that sum.

Wheeler & Hall, of Dover, and *Ira Perley*, of Concord, for the plaintiffs.

John H. Wiggins and *F. F. Heard*, of Boston, and *C. W. Woodman* and *D. M. Christie*, of Dover, for the defendant.

BARTLETT J. In some of the books there is an apparent confusion in the use of the term "good-will." It is said to bear two significations: first, the "advantage arising from the mere fact of sole ownership of the premises, stock or establishment, without reference to other persons as rivals;" and, second, the "advantage arising from the fact of excluding the retiring partner from the same trade or business as a rival." Story Part. §99. But we think there is no good ground for such a distinction in law. Indeed, it

seems hardly consistent with the definition given by Story in the first part of the section cited. He says, "Good-will may be properly enough described to be the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from accidental circumstances or necessities, or even from ancient partialities or prejudices. Thus an inn, a nursery of trees and shrubs, a fashionable stand, or a newspaper establishment, may and often does enjoy a reputation and command a price beyond the intrinsic value of the property invested therein, from the custom which it has obtained and secured for a long time; and this is commonly called the good-will of the establishment." If good-will is merely the advantage from the sole ownership of property, it adds nothing in a legal view to such ownership, and is ordinarily meaningless in conveyances. Cases may be conceived where the good-will of a business is of no practical value unless accompanied by the ownership or possession of certain property, and where the ownership or possession of such property might enable a party in effect to enjoy all the substantial benefits of the good-will; as where the good-will of the public to the business is due solely to certain qualities or characteristics peculiar to the property employed in it, or to the special advantages of a particular locality. In such instances the attraction for the public patronage may be entirely in the particular property or locality, and the possessor of such property or locality may have the exclusive possession of all the means of attracting patronage, that belongs to the business. The vendor of such property has not sold the good-will of his business, though he may have parted with all that in fact gave value to that good-will; he has still in law the right to carry on his old business, for he did not give up that by his contract, but he may have disabled himself in fact from exercising that right and from enjoying the popularity his business had attained, because he has ceased to possess the particular property which was essential to the business and its popularity. So in a legal view the purchaser has not acquired the good-will of the seller's business: he has obtained no legal right to exclude the latter from carrying it on as before; but as the particular property was essential to the business or its patronage, he may have gained the exclusive power to conduct the business or to receive the patronage. If in such case the seller could find other means to carry on his old business and secure the old custom, there would be nothing to prevent him in the mere fact that he had sold the property which he had formerly used in that business. If A, the owner of a printing establishment, sells the premises and all the

material used by him in the business, and nothing more, the purchaser has the sole ownership and the exclusive possession of the property, but he has not the good-will of the business established by A, and it cannot be doubted that the latter, so far as this sale is concerned, has the right to continue his old business at the next door; and by his old business, we mean not merely a business of the same kind, but the identical business. But if B has established a business in selling the products of his vineyard, and obtained a large patronage for it solely because of the peculiar qualities of a kind of grapes that will grow there and not elsewhere, and he sells the vineyard, he has not sold the good-will of his business, for there is nothing to distinguish this case legally from that just supposed, but he has in fact parted with all that rendered the good-will valuable, and lost the power of continuing his old business, but not the right. These examples show that there may be a variety in the circumstances upon which the good-will and its value are dependent, but they do not establish any diversities in the legal nature of good-will. In *Kennedy* v. *Lee* (3 Merivale, 451), Lord Eldon said that "where two persons are jointly interested in trade, and one by purchase becomes sole owner of the partnership property, the very circumstance of sole partnership gives him an advantage beyond the actual value of the property, and which may be pointed out as a distinct benefit essentially connected with the sole ownership. In the case of the trade of a nurseryman, for instance, the mere knowledge of the fact that he is the sole owner of the property, and in the sole and exclusive management of the concern, gives him an advantage which the other partner, supposing him to carry on the same trade with other property, not the partnership property, would not possess. In that sense, therefore, the good-will of a trade follows from and is connected with the fact of sole ownership." The business in question in *Kennedy* v. *Lee* was that of nurseryman, and from what has already been said, it is apparent that the remarks of Lord Eldon may have been correct when applied to that case; however they probably were not intended as a general legal definition of "good-will," the case calling for no construction of that term, and they cannot be received as such. He adds, "There is another way in which the good-will of a trade may be rendered still more valuable, as by certain stipulations entered into between the parties at the time of the one relinquishing his share in the business; as by inserting a condition that the withdrawing partner shall not carry on the same trade any longer, or that he shall not carry it on within a certain distance of the place where the partnership trade was carried on, and where the continuing partner is to carry it on upon his own sole and separate account." Here the Lord Chancellor had in mind the exclusion of the retiring partner from a rival business, and he speaks of it not as

a consequence of the transfer of the good-will, but as the result of some additional contract. In *Crattwell* v. *Lye*, 17 Vesey, 346, Lord Eldon says, "The good-will, which has been the subject of sale, is nothing more than the probability that the old customers will resort to the old place." The same or similar language has been used in other cases. *Harrison* v. *Gardner*, 3 Mad. 455. *Chissum* v. *Dewes*, 5 Russ. 29. This remark of Lord Eldon may be generally correct in certain cases where the good-will is dependent for its value solely upon locality, but it would be too narrow a construction of an expression made in reference to particular instances to regard it as a general definition. *Churton* v. *Douglass*, 1 H. R. V. Johnson, 174. There are kinds of business in which the good-will is substantially independent of any precise locality, and where it may be valuable not only from the likelihood of retaining old custom, but also because of the probability of attracting new by its established reputation or other acquired advantages. An established business often obtains a value beyond the actual amount of tangible property employed, from the ability with which it has been conducted, the reputation it has attained, the advantageous site it has secured, or other circumstances which have gained it popularity or given it the power of attracting patronage. The owner of such a business obviously may have great advantages over one who sets up a new business of the same kind in competition with the old and well-known establishment. The intention of the parties to a sale of such an establishment with its good-will is to transfer these advantages to the purchaser; it is the object of the contract to place him, so far as may be, in possession of the business with these advantages, so that he may continue it as the seller might have done. The seller has parted with his right to this established business and may not lawfully continue it, while the purchaser has acquired that right. By the sale every thing transferable necessary to effect such a result, passes. The contract does not include the popularity and personal qualities of the seller, which are not transferable, but the good-will they have gained for the business. It has never been understood that such a sale binds the seller to exercise his ability or industry for the purchaser, for he has merely sold the business with the advantages which they, with perhaps other circumstances, have established; and we think such a contract does not restrain him from their general exercise. The policy of the common law would not justify any unnecessary implication of such restraint; and we think the somewhat indefinite character and practical limits of an exclusion from competing business would not recommend it to any special favor. Before the sale the vendor had no immunity from competition, though in some cases he has been protected from rivals who fraudulently held themselves out as conducting the business he had established. *Bell* v. *Locke*, 8 Paige, 75. *Hogg* v. *Kirby*, 8

Vesey, 215; 2 Story, Eq. § 95; Collyer, Part. (3 Am. Ed.) § 162 n. This protection is given not to exclude honest competition, but merely to secure the tradesman against wrongful interference in the advantages he has acquired for his business. If it be the object of a sale of the good-will to place the purchaser, so far as may be, in possession of the advantages the seller has acquired for his establishment, then the exclusion of any fair competition is not a necessary incident, for that was not one of those advantages. As such a sale does not include the personal popularity, abilities, or exertions of the seller, but so far as these are concerned, only the advantages they have gained for the established business, we think the purchaser may enjoy all the latter without the exclusion of the seller from the kind of business. The vendor sells only the good-will of the particular business, and not his right to engage in business; he parts with the established business, but not with his right to set up a new one. He cannot carry on the identical business he has sold, for he has relinquished all his right to that by the sale; but so long as he does not continue or attempt to carry on that, there is nothing to prevent him from establishing a new and similar business, since there is no necessary legal limitation as to its kind. His exclusion from the kind of business might make the good-will sold more valuable, and so perhaps might his continuing to exert his ability for the benefit of the purchaser, but neither are necessarily involved in the contract, and the purchaser desiring such advantages must secure them by special contract. *Kennedy* v. *Lee*, 3 Mer. 452. By the sale of the good-will of an established business, we understand that the seller parts with, and the purchaser acquires the right to continue, that established business, with all the advantages belonging to it as such. This, as we understand it, is the view of the Vice-Chancellor in *Churton* v. *Douglass*. He says, "'Good-will,' I apprehend, must mean every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." The sale of the good-will of a business will take from the seller the right to continue or in any way hold himself out as continuing the identical business, the good-will of which he has sold, but will not necessarily prevent him from engaging in a similar business that is not and does not purport to be a continuation of the old one. *Churton* v. *Douglass*; *Crattwell* v. *Lye*; *Shackle* v. *Baker*, 14 Vesey, 468; *Harrison* v. *Gardner*; *Kennedy* v. *Lee*, Linley, Part. 705, *et seq.*; *Snowden* v. *Noah*, Hopkins, 353. Possibly cases may arise where the questions, what is a continuance of the old

business, and when a party is to be considered holding himself out as continuing it, may prove difficult, but perhaps the difficulty will quite as often be found one of fact arising from the nature of the business or the circumstances on which its good-will is founded, as of law. The plaintiffs claim that the defendant has no right to set up a rival newspaper, because of his sale to them of the subscription list of the Dover Gazette. The original agreement between the parties was in writing, and provided, among other things, for the sale of all the presses, types, printing material, papers of every kind, and all the property now owned by said Gibbs, and belonging to the Dover Gazette printing establishment, *in se*, at the appraisal of A B and C, which was to be "final as to the value of said printing establishment." By a subsequent additional contract in writing, the parties agreed that the appraisers should, at the time they appraised the property before mentioned, "also appraise the present value of the subscription list of the Dover Gazette, and also the good-will of the Dover Gazette printing establishment." These contracts made provisions that if either party should refuse to carry out the agreement, such party should pay to the party ready and willing to comply with the same, $1000; "the same to be regarded as settled and liquidated damages." A further written agreement provided that the defendant should pay to the plaintiffs all money received by him for advance subscriptions at the time of the transfer of said printing establishment, and also for the fulfilment of existing contracts for advertising, the proceeds of which were to be apportioned in a specified manner. The appraisers, by their written report, after stating that they had "examined all the property referred to in the agreement, and duly considered the whole matter, and heard the parties," award "that said printing establishment, with the presses, type, materials, property, subscription list, and good-will belonging and appertaining to the same, is of the value of $4800." The defendant, by his bill of sale, in consideration of $4800, sells and conveys to the plaintiffs "the printing establishment, with the presses, types, material, property, subscription list, and good-will belonging and appertaining to the same, as appraised by 'A, B, and C,' as by their award dated," &c., "a copy of which is in the possession of each of the parties" to the bill of sale; and he adds, "meaning hereby to transfer and confer all of the right and interest I have in the Dover Gazette printing establishment, as existing and heretofore carried on by me." This establishment seems to have included the publication of a newspaper called the Dover Gazette, and a job printing office. If we assume, as the plaintiffs claim, that it was the intention of the parties in their contract that the sale should be of the whole establishment, including the newspaper with its good-will; that is, of all the material property, with the right to continue the newspaper and the

printing office, with all the advantages that popularity, reputation, or other circumstances had given them: still we see no good reason to hold that the special mention of the subscription list among the other property sold excludes the defendant from the right to publish a new and different newspaper. We understand the subscription list to be a catalogue of the subscribers of the newspapers, with their residences. It in fact contains a list of existing customers for the journal, and in providing for an appraisal of its existing value the parties seem to have intended in substance an appraisal of the value of the right to furnish this newspaper to these customers, or perhaps to these and all others desiring it, and a transfer of the subscription list in this case would seem to pass the plaintiffs not only the material list but also such a right so far as it was transferable by the defendants. But the right thus transferred is not to supply these subscribers or others with all newspapers or any other journal than this, to which alone the subscription list has reference. If in this view the words add nothing to the general terms used, the same is true of other items enumerated in the agreement and bill of sale. The number of subscribers to a newspaper forms so important an element in its value, and in this case the newspaper was so considerable part of the concern, that it does not seem singular that the subscription list was specially mentioned. The plaintiffs' position would give greater effect to the sale of the subscription list, than the law, as we understand it, would allow to a transfer of the newspaper establishment with its good-will. The defendant, however, contends that by the contract the good-will of the job printing office only, and not of the newspaper, passed: were it allowable to adopt this construction, the case would obviously stand no better for the plaintiffs. We think there is nothing, in the written contract between the parties, that deprives the defendant of the right to establish a new journal different from the Dover Gazette, and in connection with his newspaper a new printing office, which is not a continuation of the old business; for he has only parted with his right to continue the old established business and the old journal. If these views are correct, the plaintiffs' argument, founded upon the two significations which they suppose attach to the term "good-will," must fail: there is no occasion to inquire in which sense the term was used, or to resort to the aid of parol evidence: nor can such evidence be received to show that at the time of the sale or during the prior negotiations, a verbal agreement was made by the defendant, that he would not establish a competing business, if such be the fact; for the contract is not silent upon this point, but contains in effect an agreement by the defendant not to continue the particular business sold to the plaintiffs; and to allow such proof would be to receive parol evidence to change a written agreement not to continue a particular newspaper and a designated

printing business into a general contract not to set up any rival newspaper or engage in any competing business. 2 Phill. Ev. 358. 1 Green. Ev. § 275. *Pillsbury* v. *Locke*, 33 N. H. 102. *Churton* v. *Douglass*. Of course the declarations alleged to have been made by the defendant since the written agreement was entered into cannot be received to vary its effect. *Fitts* v. *Brown*, 20 N. H. 398. The plaintiffs have attempted to show that by the usage among the publishers and conductors of similar journals and printing establishments, a sale of the good-will and subscription list takes from the seller the right to establish a competing journal and printing office; but we think their evidence fails to show a usage of that description, "so well settled, so uniformly acted upon, and of so long a continuance, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to and conformity with it." *Foye* v. *Leighton*, 2 Foster, 76. Under these circumstances, it is unnecessary to inquire whether the present is one of these cases where usage is to be admitted in construing the contract. See *Wheeler* v. *Nurse*, 20 N. H. 221. *George* v. *Bartlett*, 2 Foster, 498.

The plaintiffs claim that the conduct and declarations of the defendant have been such that it would be against good conscience for him to set up a rival business; in short, that the defendant is equitably estopped to deny an agreement on his part not to set up such a business, by his representations made during the negotiations and by the facts that the appraisers, with the knowledge of the parties, fixed the value of the good-will upon the supposition that the defendant was excluded from any competing business, and that the plaintiffs made, and the defendant received payment for the good-will as thus appraised. This suit is brought not to obtain relief from fraud or mistake in making the writings, and the bill seeks not to set aside the award or the contract, or to reform the latter, but to enforce it; and in this case the "cotemporary or prior parol stipulations between the parties are to be regarded as merged in the written contract." 2 C. & H.'s notes to Phil. Ev. 519. *Nutting* v. *Herbert*, 35 N. H. 126. *Hunt* v. *Rousmanier*, 8 Wheat. 174. They cannot be received to vary it, and to allow them in this case the effect by way of estoppel, which the plaintiffs claim, would be a mere evasion of the rule. Lord Eldon says, in *Crattwell* v. *Lye*, "With regard to conduct, a man might stand by and give encouragement, generating a confidence that he would not engage in such a trade, inducing other persons to involve themselves, on the ground of which this court might interfere." The sale in question in that case was made by the assignees of a bankrupt, and the suit was brought to restrain the bankrupt from engaging in a similar business. We understand the remark of the Chancellor to be but an intimation that the court might in the case supposed apply the

ordinary rules of estoppels in pais, and we find nothing in it or in the case to indicate that in such application, if made, the settled rules of the law as to parol evidence were to be violated or evaded in any case where the rights of the parties were founded upon their written contract. In the present case the agreements for sale did not authorize the appraisers to fix the value of the good-will and subscription list upon the supposition that the defendant was not to have the right to engage in any business of the same kind, or bind the defendant to part with that right, and he did not attempt to do so by his bill of sale. The award itself does not show that the appraisal was made as the plaintiffs claim, and whether in the present case we can look beyond that and receive the evidence of the appraisers to learn what was appraised. (See *Furber* v. *Chamberlain*, 9 Foster, 405. *Aldrich* v. *Jessiman*, 8 N. H. 520; and *Harrison* v. *Gardner*.) We need not inquire, for the evidence does not show that the defendant knew that the appraisement was thus made, or received payment for surrendering any such right. The papers do not show such an appraisal; there is no direct evidence of the defendant's knowledge, and it is not to be inferred from the mere fact that the tangible property may not have been worth the $4800, if that is to be considered, for the good-will and subscription list were also to be included in the appraisement, nor do we find any fact in the case from which such knowledge is fairly implied, and certainly there is no presumption that the defendant supposed he was including in his contract any such undefined restraint. This view would seem to be confirmed by the evidence that the defendant declined to sign a bill of sale containing this clause: "And the said Gibbs, for the consideration aforesaid, does hereby agree that he will do nothing to injure the said Smith and Foster in the business aforesaid or to interrupt or hinder, or in any way damnify them in the full and free use, exercise and enjoyment of all and everything hereby conveyed;" and of the manner in which he thus declined, if evidence of what took place in the absence of the plaintiffs, between the defendant and the attorney employed by the parties to draft the bill of sale, can be considered. If the defendant did not know that any such exclusion entered into the appraisal or sale, he cannot be estopped by his acceptance of the $4800, however it might have been if he had been so informed, for the estoppel is claimed only upon the ground that it would be a fraud in the defendant, having knowingly received payment for the relinquishment of certain rights, now to assert them. He had the right to receive for the property mentioned in the agreement its value, as fixed by the appraisal, and as the case stands, we must take it that he received the $4800 supposing that sum to be the value thus fixed and nothing more, and thereupon made a conveyance of that property as he had agreed, and nothing further. Here is no act or conduct

of the defendant inconsistent with the right he now sets up, or that would make it a fraud on his part to assert such right. *Rickard* v. *Sears*, 6 A & E. 460. 2 Smith's L. C. 531, *et seq.* Besides it would seem that the plaintiffs can hardly claim that they were misled by the defendant's conduct. The agreement showed exactly what was to be appraised and sold, and it did not include any relinquishment on the part of the defendant of his right to set up a new business; the appraisal was made and the plaintiffs did not forfeit the $1000 agreed on as liquidated damages, but paid the $4800 fixed by the award, and took a conveyance of the establishment with the property, subscription list and good-will appertaining and belonging to it. The property and rights agreed to be sold, and sold, distinctly appear from the written contracts, which operate according to their legal effect. *Furbush* v. *Goodwin*, 5 Foster, 456; and this knowledge was equally open to both parties. *Odlin* v. *Gove*, 41 N. H. 473–4. Looking at these contracts we find that the plaintiffs have obtained all that the defendant agreed to sell or did sell to them. We think that the case of *Harrison* v. *Gardner*, on which the plaintiffs seem to rely, is distinguishable from the present. There, by written articles, reciting among other things that the plaintiff and defendant had agreed not to renew or continue their co-partnership for any further term, but had not fully agreed which of them should remain in the occupation of the premises in "which the said trade had hitherto been carried on, upon what terms, or for what consideration either, and which of them, the said late co-partners should retire from the said concern." It was provided that it should be left to arbitrators to determine, among other things, which of the two "should have the superintendence and administration of the assets and funds" of the firm, and which "should continue and remain in possession of the premises, stock in trade, effects and business, and upon what terms;" and "what conveyances, assurances and releases, should be executed by either of said co-partners to the other." The arbitrators awarded among other things, that in consideration of £2000 to be paid by the plaintiff, the defendant should assign over the premises wherein the co-partnership trade was carried on with the good-will of the trade to the sole use and benefit of the plaintiff. The court upon the evidence found substantially, as the plaintiff had alleged in his bill, that the award was made upon the understanding between the parties and the arbitrators, that the defendant should not carry on a trade of the same kind in Fore Street or its vicinity, and that a part of the sum awarded to the defendant and paid by the plaintiff was on account of this restriction, which on the faith of this understanding was omitted to be inserted in the award; and a decree was made enjoining the defendant from carrying on a trade of the same kind in Fore Street or its vicinity. The Vice-Chancellor, Sir Thomas

Plumer, says: "The arbitrators were not like arbitrators in general, to decide disputed matters, but to arrange terms, adjust accounts, and determine on subjects upon which they must first consult the parties." From the agreement as stated in the case it appears to have been within the power of the arbitrators to have inserted the restriction in the award, and to have made the defendant an allowance on account of it. Upon the finding of the court it must be taken that such an allowance was made and accepted by the defendant with full knowledge of the fact, and that the restriction would have been put into the award but for the understanding, and the defendant's promise to be bound by it. In the present case the arbitrators had no such power, and the insertion of a restriction in the award was not prevented by the understanding of the arbitrators and the parties as to it, or by the conduct, request, or promise of the defendant, nor was the restriction omitted in the written contract upon the faith of any such understanding between the parties or of any such promise by the defendant; nor has the defendant been shown knowingly to have received payment from the plaintiffs for such an undertaking. Yet these differences involve the points upon which the decision in *Harrison* v. *Gardner* turned. The Vice-Chancellor says: "The ground on which I decide this case is upon the good faith and understanding when this money was awarded to the defendant for the good-will that he would not carry on the trade in Fore Street or its vicinity, which good faith and understanding was the occasion that the award was silent on the subject. It is clear that such an understanding did exist." He also says: "It is said this is a novel bill, it being to carry an award into execution with an addition by parol evidence. This is not so. It is a bill for an injunction on the ground of fraud, by receiving £500 for not doing what he afterwards does do."

It is unnecessary to examine the merits of *Harrison* v. *Gardner*, for this case does not present the essential points upon which that decision passed, nor do we think that the intimation in *Shackle* v. *Baker* can aid the plaintiffs here. The report of that case does not set out the bill, but it appears that before answer a motion was made for an injunction to restrain the defendant from proceeding under a judgment for the consideration of a sale by the defendant to the plaintiff of the good-will of a millinery business, the affidavits stated an agreement for the sale in consideration of £2000; that the plaintiff proposed that a covenant should be given that the defendant and his wife would not for ten years carry on the same business in Liverpool &c. and that they would use their best endeavors to assist the plaintiff, and procure customers, &c.: that this covenant being objected to by the defendant and his wife upon the ground that it was an impeachment of their honor and unnecessary, was waived by the plaintiff upon the mere undertaking of the

defendant and his wife. They also stated acts of the defendant and his wife in violation of this undertaking. The Chancellor denied the motion, but gave the plaintiff leave to move again upon the coming in of the answer, and said, "Considering the covenant which this plaintiff proposed to have, as having been kept out by bad faith, yet if I now enjoin before answer or any default of appearance, I must give the same effect to the agreement, as I should give at the hearing, if the covenant had been contained in it, upon the ground of fraud." Whatever weight may be due to the intimation contained in this case, it is manifestly predicated upon an essentially different state of facts from that existing in the present case, and is not applicable here. If in this case we adopt the broader construction of the contract, yet the defendant has not continued or held himself out as continuing the business of which he had sold the goodwill to the plaintiffs. The newspaper which he commenced was not and did not purport to be the "Dover Gazette," and was not held out as published in continuation or succession to that journal. It was different in name and fact, and was as it claimed to be, a new journal. It was called the "Dover Sentinel," and differed sufficiently in appearance from the "Gazette" to avoid liability to mistake. Although both newspapers claimed to support the principles of the "Democratic Party," they in fact advocated quite different views upon several questions of public policy which were then regarded by many as grave and important, and therefore were likely to obtain their chief patronage from different sources, as each would naturally depend mainly upon the supporters of its peculiar views for subscribers. Their advertising business would probably be affected in a considerable extent by those differences; subscribers would generally be likely to prefer for this purpose the journal for which they subscribed, and others would ordinarily be influenced by the character and extent of the circulation. However, patronage in the way of subscription, and to a considerable extent of advertising, of the one was not necessarily inconsistent with patronage of the other in the same way, and both might receive the subscriptions and publish the advertisements of the same individuals. The mere fact that they were competing would not in establishments of this kind prove the identity of their business, but possibly cases might be conceived where the nominal establishment of another business of the kind sold might be in fact but a continuation of the latter. So, too, the printing office set up by the defendant was not and did not purport to be in continuation of or succession to the "Dover Gazette" printing office. It was started and carried on by the defendant in connection with the new journal, and was likely to be mainly dependent for its patronage upon that connection.

The patronage of newspapers is generally dependent on very many other circumstances than the fact of their being owned, con-

ducted, or edited by particular individuals, though there are probably cases where the circulation of a journal is mainly due to the abilities of a particular editor. But we see nothing in the evidence that leads us to think that the Dover Gazette newspaper or printing office had been so particularly dependent on the personal editorship or management of the defendant, that his establishment of the Sentinel with its connected office would naturally so call to the latter the old patronage, to the exclusion of the former, as to render his journal and printing office in fact a continuation of the business included in the bill of sale. The Sentinel and its printing office did not, however, purport to be conducted by the defendant alone, but by "J. T. Gibbs & Co.," and the newspaper was in fact edited by the defendant and another. The business was carried on in the old premises, but they belonged to the defendant, and had been voluntarily abandoned by the plaintiffs for other apartments at some little distance. Considering these circumstances, also the character of the establishment, the size and situation of the town in which they were carried on, and the fact that the defendant, in his testimony, denies having solicited the patrons of the old establishment to withdraw their support and transfer it to the new, and that he is not shown to have done so, and the further fact that to a very considerable extent customers would not necessarily be withdrawn from the one establishment by their patronage of the other, we are brought to the conclusion that the business established by the defendant in 1860 was not a continuation or an attempt at a continuation of that described in his contract, but was a new and different business, although of a similar kind. The bill also asks a decree for the delivery of the subscription list of the Dover Gazette to the plaintiffs by the defendant. It appears that the directing books, containing the names and residence of the subscribers to that paper, were delivered to the plaintiffs at the time of the sale, and were copied by them; that afterwards the plaintiffs permitted the defendant to take these books for use in the settlement of his accounts: and the evidence, we think, shows that the plaintiffs had free access to and full possession of them whenever they chose, but fails to prove any refusal by the defendant to return the books, or any request upon him to deliver them to the defendants. As no improper detention of the books by the defendant at the time this suit was brought, is shown, we need not inquire whether his suggestion that the remedy at law would be adequate, if it were otherwise, is well founded. The bill must be dismissed.

Supreme Judicial Court of Massachusetts.[1]

Middlesex.

FITCHBURG RAILROAD COMPANY *v.* EASTERN RAILROAD COMPANY.

Exceptions sustained. Rescript. "The Superior Court had the power to set aside a verdict of a sheriff's jury upon the subject of damages for land taken and used for a railroad, for the reason that the verdict is against the evidence, when the entire evidence is before the court. The exercise of this power is entirely the discretion of the court as to their action upon an application for that purpose; and no provision being made by statute for a report of the evidence, such motion is not one that imperatively requires the court to appoint a commissioner to ascertain and report what was the evidence before the jury; but if satisfied that the case can be fully presented to the court as exhibited to the jury, and the court shall in any proper form sanctioned by them, have the evidence before them, they have the power to set aside a verdict as against evidence."

E. H. Derby and *E. F. Hodges*, for plaintiffs; *J. G. Abbott*, for defendants.

EDWARD B. TAYLOR *v.* THOMAS H. PAGE.

It was agreed that M. mortgaged the premises to D. to secure M.'s note, given for spirituous liquors sold by D. in violation of law before the maturity of said note; D. assigned to the plaintiff for a valuable consideration, but without notice to him of the consideration of the note.

Conditional judgment for plaintiff. Rescript. "The note being valid in the plaintiff's hands, the mortgage given to secure payment of the note is also valid in his hands."

John W. Emerson, for plaintiff; *W. P. Webster*, for defendant.

SOLOMON E. BYAM *v.* JAMES ROBBINS.

Judgment for the defendant. Rescript. "A boundary line between coterminous proprietors having been determined by the award of referees in an arbitration entered into by them, the award is

[1] Reported by George M. Hobbs, Esq.

evidence in an action of trespass between the same parties, in which the same boundary line is in controversy."

Morse and *Stevens* for plaintiff; *D. S. Richardson* for defendant.

SAMUEL L. CUTTER *v.* CITY OF CAMBRIDGE.

Exceptions sustained. Rescript. "1. The alteration of the road in 1859, by discontinuing a part of its width on the easterly side thereof, was not intended to make, and did not make any change of the boundary of the road on the westerly side, although the record recites that the monument established on the east side would leave the road forty feet wide.

2. If fences or buildings have stood for forty years within the limits of the highway, the boundaries of which can be made certain by records or monuments, it is a justification of their continuance under Rev. Stat. ch. 24, sec. 61, and Gen. Stat. ch. 46, sec. 1."

Charles W. Storey for plaintiff; *John C. Dodge* for defendants.

EMILY LOW *v.* CITY OF LOWELL.

Exceptions sustained. Verdict set aside and new trial granted.

Rescript. "1. This case does not come within the rule of the Superior Court, which requires an answer in writing to be filed in all cases brought by appeal from the judgment of a police court or a justice of the peace. That rule is applicable only, where no written answer was filed before the magistrate or police court. In the case at bar, a written answer was filed in the police court which was equivalent to the general issue. The provisions of the practice act are not applicable to actions pending before police courts or magistrates (Gen. Stats. ch. 127, sec. 85,) so far as they relate to pleadings. Such cases may be tried either 'on pleadings in writing, as heretofore used,' or on an oral denial of the plaintiff's right to maintain his action. (Gen. Stats. ch. 120, sec. 16.) It was therefore competent for the defendants to file a written plea in the nature of the general issue before the police court, and under it prove in bar of the plaintiff's right of action that she was a married woman.

2. All other rulings were correct."

Charles M. Williams for plaintiff; *A. R. Brown* for defendants.

GEORGE MUGFORD ET UX. *v.* DANA RICHARDSON.

An action of tort for injuries to the wife for an alleged assault. Plaintiffs were defendant's tenants with rent in arrears. On March

30, defendant gave plaintiff written notice to quit for non-payment of rent, in due form of law. On 4th May following, plaintiffs not having left the premises, defendant came into the tenement without objection, and after making some repairs, proceeded to take out the windows. After he had taken out the front windows, the wife seated herself in a chair in the doorway leading to the bedroom adjoining, extended her hands to the door casings, and insisted that defendant should not take out the windows of that room, as her infant of a few weeks old was there in bed, and that he must not enter the room. Defendant thereupon declaring the house his, proceeded to remove her hold from the door casings, at which time the alleged assault was committed, and took out the remaining windows, and carried them off and stored them.

The testimony as to the character of the assault was very conflicting, as was also that in regard to the extent of the injuries. The windows were not repaired nor returned during plaintiffs' stay there, which was some four or five months, during which time they paid no rent. There was no evidence that the children or any member of the family suffered by exposure or otherwise, but in severe rains the water came into the premises, and sometimes in the night they were obliged to wipe it up. There was some evidence that the plaintiffs' children cried when the windows were being taken out.

The plaintiffs asked the court to instruct the jury that it being admitted that the defendant did not take out the windows to repair them, he could not be justified in going into the rooms and removing them for the purpose of inducing the tenants to leave by exposing them to the weather; that he could not legally take out said windows, if the plaintiffs objected; that defendant had no right to enter the bedroom after he was directed not to go there.

The court refused so to rule, stating that it was not so admitted, but did rule that the notice to quit being properly given, as was admitted, the defendant had the right to enter the premises at the time and in the manner he did, and to take out the windows as he did, provided he did it without creating a breach of the peace; that if the wife undertook to prevent him from doing it, he had the right to use as much force as was necessary to overcome the resistance; that if he used more force than was necessary for such purpose, and she was injured by reason of such excess of force, the plaintiffs could recover for the injury thereby sustained; that if they came to the question of damages, plaintiffs would not be entitled to recover anything for any injury to the wife from exposure by reason of the taking out of the windows.

Verdict for defendant. Exceptions sustained. Rescript. "The defendant had sufficiently acquired the possession to justify his acts

as to any civil action for damages, if no unnecessary force was used as respects the plaintiff's wife."

A. R. Brown for plaintiffs; *J. N. Marshall* for defendant.

ALFRED HACKETT *v.* ALONZO P. B. KING.

Plaintiff's exceptions sustained. Rescript. "The warrant relied on (which was for the arrest of plaintiff on a criminal charge) in justification was not provable without producing it or showing that it could not be produced."

R. B. Caverly for plaintiff; *D. S. Richardson* for defendant.

INHABITANTS OF STOW *v.* LUKE SAWYER, ADMINISTRATOR.

Appeal by administrator with the will annexed of Sally Gates, from decision of commissioners appointed by Probate Court. Sally Gates was an insane person who stood in need of immediate relief in another town, whereof the appellees, who were the town of her lawful settlement, were duly notified, and requested to remove her, which they did, and supported her till her death, being ignorant that she was possessed of property, and supposing her a pauper. She had at the time of removal several hundred dollars on deposit in a savings bank, which remained hers till her death, and have since come to the possession of her executor. Above are agreed facts.

Claim of appellees disallowed.

"The support and relief furnished to Sally Gates were a charity for which the town of Stow has no legal cause of action, there having been no fraud practised on the town as to said Sally's ability to pay for her own support either in whole or in part."

George M. Brooks for appellees; *G. F. Hoar* for appellants.

LEVI PECK, ASSIGNEE, *v.* SAMUEL THOMPSON.

An action upon a recognizance. At the trial the defendant objected that the recognizance did not recite enough to show that the Justices' Court had jurisdiction of the action in which it was taken, and for that reason the recognizance was void. The recognizance was the usual one in the Justices' Court entered into on an appeal for payment of intervening costs. It is headed memorandum, and recites that on a certain day personally appeared before the Justices' Court for the county of Suffolk, and acknowledged themselves to be severally indebted, &c. &c. The condition of the above-written recognizance is that the plaintiff, by the consideration

of the justices of the Justices' Court for the county of Suffolk, recovered judgment for $39, &c. &c., signed by the assistant clerk.

Exceptions overruled. Rescript. "The jurisdiction of the Justices' Court sufficiently appears on the face of the recognizance. The jurisdiction is given by statute of cases of personal action where the *ad damnum* does not exceed $100, subject to certain exceptions. It is an insufficient objection that the recognizance does not show by positive negation that it was not a case falling within the excepted cases where such jurisdiction was limited to $20."

Jeremiah Brown for plaintiff; *E. M. Bigelow* for defendant.

PHILIP LEONARD *v.* E. P. TRAVIS ET AL.

An action to recover $11, balance of account. Defence, payment, and production of receipt signed by plaintiff. There was evidence tending to show that one Nason, defendant's clerk, had instituted proceedings against plaintiff upon charge of embezzlement of money, and caused his arrest on the day previous to that on which the receipt was given, and that the plaintiff had been discharged from arrest by the officer, at the instance of said Nason, on the day of the arrest; that on the day succeeding the arrest, the plaintiff gave said receipt for said $11, receiving only $3 in cash, but taking from said Nason a receipt produced at the trial for $8, "for costs of prosecution." It was claimed by the plaintiff that the proceedings on which he was arrested were criminal proceedings, and that they were unlawfully settled. No question was raised as to the offence alleged or as to the nature of the warrant, if there was any warrant. No copy of the warrant, nor any evidence of its contents, was offered; nor was there any evidence as to the manner of the settlement of the prosecution, nor of the disposition of the $8 paid by the defendants at the order of the plaintiff to said Nason.

The court instructed the jury that if the defendants retained the $8 in accordance with their request for Nason to settle a criminal prosecution, knowing the same to be in settlement of such a prosecution, the contract was illegal and no payment.

Defendants excepted. Exceptions sustained. Rescript. "The defendants owed the plaintiff a just debt, and paid $8 thereof, at the plaintiff's request, or his order to one Nason, and the residue of the debt ($3) to the plaintiff himself.

There is no case in which payment of a debt has been held void for illegality on the ground that the debtor knew that the creditor intended to apply it to an illegal use. The plaintiff could have maintained an action against the defendants for the $11, and a plea

or answer that the plaintiff meant to apply the money, or any part of it, if recovered, to the compounding of a felony, or any other unlawful purpose, would be by demurrer.

The instruction given to the jury, at the plaintiff's request, seems to have been given without any reported facts, and on a supposition inconsistent with the reported facts that $8 were 'paid by the defendants at the order of the plaintiff to Nason.'"

E. F. Dewing for plaintiff; *John W. Bacon* for defendants.

CITY OF CAMBRIDGE *v.* COUNTY COMMISSIONERS OF THE COUNTY OF MIDDLESEX.

Petition for *certiorari* to said commissioners, seeking to quash their proceedings, in ordering a jury to estimate damages for land taken by the city for the purpose of laying out, making, and maintaining a common sewer. Petition to the commissioners for a jury was filed before them January 14, 1861. The Board of Aldermen and Common Council of Cambridge awarded damages to the owner for such taking October 6, 1859.

Certiorari granted. Rescript. "The application not having been made to the county commissioners within six months, they had no authority to proceed upon it."

John C. Dodge for petitioners; *R. H. Dana, Jr.*, and *H. W. Muzzey*, for respondents.

Suffolk.

JOANNES *v.* PANGBORN ET AL.

It was conceded that if costs were allowed, the taxation was correct; but the defendants objected to the allowance of any costs, as the verdict did not exceed twenty dollars. The clerk allowed full costs under Statutes Ch. 156, § 5, by these words, to wit:—"If the plaintiff finally recovers," and as one cent interest had accrued since rendition of verdict and up to judgment, the amount plaintiff finally recovers is $20.01, and interest is allowed by Statute Ch. 133, § 8. Defendants appealed, and Superior Court sustained appeal. The plaintiff then appealed to the Supreme Court, and the following rescript was sent down.

"The judgment of the Superior Court that the plaintiff was not entitled to costs affirmed.

The amount of the verdict is alone to fix the liability of the defendant to pay costs. If the verdict does not exceed twenty dollars in a personal action like the present, originally brought in the Su-

perior Court, no costs are taxable under Gen. Stat. ch. 156, § 5. The interest accruing subsequent to the verdict in the present case does not affect the question of costs."

Plaintiff *pro se*; *Joseph Nickerson* for defendants.

JAMES BEATTY *v.* SAMUEL H. RANDALL.

An action of tort for the conversion of $550 in bank-bills on the Peoples Bank, Roxbury. Before this action was commenced a bill in equity had been brought by the present plaintiff (with whom his wife joined) against this defendant, signed and sworn to by this plaintiff, and in it it was recited that Beatty and his wife were jointly possessed of these bank-bills. The defendant claimed that plaintiff was in this action estopped from showing that he was sole owner of the bills. The only evidence offered by the plaintiff as to the value of the bills was that an auctioneer sold some real estate for the plaintiff, and the purchaser, to pay for it, drew from the Peoples Bank bills to the amount of $550 and delivered them to the auctioneer.

Exceptions overruled. Rescript. "If the declaration is bad it should have been demurred to, and judgment entered on the demurrer. The case having been tried on its merits, exceptions cannot now be sustained in merely formal and technical grounds. 10 Cush. 117.

The plaintiff's bill in equity and the recitals therein were rightly held to be evidence against him, but not to estop him from now claiming the property as belonging to him solely.

The evidence of the value of the bills, though slight, was competent; and no counter evidence being introduced or offered, the jury were rightly instructed that they might find that the bills were of the nominal value thereof, that is, were worth the sums which they on their face promised to pay to the holder."

Oliver Stevens for plaintiff; *Samuel H. Randall* for defendant.

Essex.

SALLY GOODWIN, PETITIONER, *v.* INHABITANTS OF MARBLEHEAD.

Petition dismissed with costs.

"*Certiorari* does not lie to the inhabitants of a town, or to the selectmen of a town to quash proceedings in laying out a town-way."

J. H. Robinson for petitioner; *S. B. Ives, Jr.* for respondents.

Supreme Court of Errors of Connecticut.—New London County, October Term, 1861.

State of Connecticut *v.* The Norwich and Worcester Railroad Company.

A railroad company was chartered with a capital of $1,000,000, with a provision in its charter that its capital stock should be exempt from taxation until the tolls collected by the company should be sufficient to afford a dividend of six per cent. per annum on the capital stock. Its capital was afterwards increased by authority of the legislature, by adding to it at one time $300,000, at another $200,000, and at another $500,000. It was afterwards again increased by the creation of $425,000 of additional stock, to be called "preferred stock," and upon which dividends were first to be paid, the holders of the old stock to be entitled to the new, and being authorized, on paying for a certain proportion of the new stock, to surrender their old stock and take a fixed equivalent in the new. Under the authority of this provision nearly the whole of the old stock had been surrendered and the preferred stock had become substantially the whole stock of the company. Held,—

1. That the original exemption of the capital from taxation applied to the increased capital, upon every authorized increase of the same, without any express provision to that effect in the resolve authorizing the increase.
2. That the capital in its new form of "preferred stock" was equally exempt.
3. That the provision as to the tolls received affording a dividend of six per cent. was not satisfied by their affording that dividend upon the original capital of $1,000,000, but that it was necessary that they should afford such a dividend upon the entire capital, including the original amount and all the increase.
4. That it was not enough if the receipts of the road amounted to six per cent. per annum on the entire capital, but that they must be such as to afford a dividend of that amount after taking out all the reasonable and necessary expenses of the road for the year.

Debt, to recover taxes claimed to be due to the State from the defendants, under the 24th section of the statute of 1851, with regard to taxation, which provides that every railroad company shall pay an annual tax to the State of one third of one per cent. on the market value of its stock. The case was tried in the superior court, on the general issue closed to the court.

The defendants were incorporated by the legislature of this State in the year 1832, by a close charter, under the name of the Boston, Norwich and New London Railroad Company, with a capital of $1,000,000 — the 17th section of the charter being as follows:— "The capital stock of said corporation shall be and remain free from taxation, until the tolls collected by said corporation shall be sufficient to afford a dividend of six per cent. per annum on their capital stock." In the year 1836 the corporation, under authority of the legislature, was united with a railroad company previously incorporated by the legislature of Massachusetts by the name of the Worcester & Norwich Railroad Company—the act of the legislature authorizing the union providing that the stockholders of the

Massachusetts company should become stockholders of the Connecticut company, and that after the two corporations should be united by their several acceptance of that act, they should become "one corporation by the name of the Norwich & Worcester Railroad Company," and that "all the franchises, rights, powers, privileges and property owned or enjoyed by the stockholders of the Boston, Norwich and New London Railroad Company" should belong to the stockholders of the Massachusetts company "in proportion to the number of shares by each of them owned." In the year 1839 the legislature of this State authorized the Norwich and Worcester Railroad Company to increase its capital to the extent of $300,000; and in the year 1840, a further increase of $200,000 was in like manner authorized, and in 1841 a still further increase to the extent of $500,000; and the capital was in each case increased by the company to the extent authorized. In the year 1850 the legislature authorized a further increase of the capital to the extent of $425,000, to be called *preferred stock*, and to be entitled to a dividend of six per cent. per annum before any dividend should be paid on the old stock—the new stock to be distributed *pro rata* among the stockholders in a mode prescribed by the act, and the act authorizing the creation of the stock to be subject to amendment or repeal at the pleasure of the legislature. The additional stock was immediately taken by the stockholders, and the capital increased to the extent and in the manner authorized.

From the year 1850 to the year 1855, a State tax was demanded of the defendants on their preferred stock and was paid by them under protest. From 1855 to the time of the institution of the present suit, the defendants refused to pay the tax, claiming that all their stock was exempted from taxation so long as their earnings were not sufficient to allow a dividend of six per cent. on their whole stock, which they had never been. In the year 1854 the company made a dividend of six per cent. on its preferred stock, but no other was ever made of that amount on the preferred stock, and no dividend whatever had ever been made on the other stock. The earnings of the road had however been more in the whole than six per cent. on the original capital of $1,000,000.

Under a provision of the resolution of 1850 authorizing the creation of the preferred stock, most of the holders of the old stock had surrendered their old stock, taking a prescribed equivalent in the preferred stock, so that at the time the suit was brought the preferred stock had become the only capital stock of the company, except $10,800 of the old stock which had not been surrendered.

The above facts, together with the amount of the tax due if the defendants were liable to taxation, were found by the court, and the case reserved for the advice of this court.

C. Chapman and *Willey*, with whom was *Chadwick*, for the

State, contended that the exemption of the charter applied only to the original capital of $1,000,000, and that all the increased capital was liable to taxation; that the exemption had ceased because the earnings of the road had been more than six per cent. on the original capital, to which alone the condition with regard to the earnings applied; and especially that the preferred stock, which had now by the surrender of the original and exempted stock become substantially the whole capital stock of the company, could not be regarded as exempted under the provisions of the charter with regard to the exemption of the stock there provided for, such preferred stock being not a mere increase of capital, but a new and independent stock.

Wait and *E. Perkins*, with whom was *Halsey*, for the defendants, contended that the exemption from taxation was an exemption of the *capital stock* of the company, whether remaining at its original amount or increased; that the increased capital at once merged in the original and took its character and privileges in every respect; that the preferred stock did not differ from the rest of the capital except in having certain further privileges which were given to it to induce the stockholders to advance their money and take it; that the fact that it was allowed certain privileges to induce the stockholders to take it rendered it the more improbable that the legislature could have intended to withhold from it the most important privilege enjoyed by the other stock; that the six per cent. intended was six per cent. on the whole capital and not on the original capital alone; that it was not enough that the earnings of the road amounted to six per cent. upon the whole capital, but they were to be such as to "*afford a dividend* of six per cent." which they never had been, it being the first duty of the company to keep its road in repair and the repairs having absorbed a great part of the earnings; and that the statute which by its 24th section provides for the tax, by its 6th section expressly exempted from the application of the act all corporations whose property by their charters was exempt from taxation, the latter act of 1856 providing expressly that the later section was not to be construed as conflicting with the earlier one.

Butler J. It appears from the finding and the resolutions referred to, that the corporation defendant was organized in 1832, under a special charter, with a capital of $1,000,000, by the name of the Boston, Norwich and New London Railroad Company, and by the 17th section of its charter it was provided that the capital stock of the corporation should be and remain free from taxation, until the tolls collected by the company should be sufficient to afford a dividend of six per cent. per annum on its capital stock.

In 1836 the corporation was united with a similar one incorporated by the legislature of Massachusetts, and the name changed to

that by which it is now distinguished. Referring to the resolution of that year we find nothing affecting or impairing any of the provisions of the original charter. It introduced the stockholders of the Massachusetts company as stockholders of this company, and so far forth added to the members of the company and the amount of the capital stock; and it changed the name by which the company should thereafter be known. But it expressly gave to the company thus enlarged and continued under a new name, "all the tolls, franchises, rights, powers, privileges and property then or at any time owned, acquired or enjoyed by the stockholders of the Boston, Norwich and New London Railroad Company, in proportion to the number of shares by each of them owned." It is apparent that it was the intention of the legislature to merge the Massachusetts corporation in the Connecticut one, by making the stockholders of the former, stockholders of the latter, and increasing the capital, without in any respect impairing or changing any of its chartered powers or privileges.

It also appears from the finding that by several subsequent resolutions of the general assembly and subscriptions, the capital stock of the defendants was increased to more than double its original amount. Referring to these resolutions we find nothing directly or expressly repealing or modifying any of the original provisions of the charter, or any which are in any manner repugnant to the provisions of the 17th section of the charter, and that section must be deemed and taken to be in full force, and applicable to the additions made to the capital stock, unless the contingency which is mentioned in it has happened and it has thereby become inoperative.

It further appears from the finding, that the net earnings of the corporation during any given year since its organization have not equalled six per cent. on the capital stock then subscribed and paid. It does appear that in 1854 a dividend was paid of six per cent. but a part of it was earned in previous years, and it was not paid on all the stock. We are of opinion that by a true construction of the 17th section of the defendants' charter, it was the intention of the legislature to exempt their capital from taxation until the net annual receipts accruing during any year, after deducting all proper charges and expenses incurred during the same year, should be equal to six per cent. on the then capital of the company entitled to dividends, and that such an event has not happened, and that therefore the exemption is still in full force.

In 1850 the legislature imposed a special tax upon all the railroads of the State. It is not material to inquire whether the defendants were embraced in the exempting clause contained in the sixth section of that act, as originally enacted, for the defendants paid the tax until 1856, and in that year a declaratory act was passed which shows a clear intention to exempt the defendants, if

they were still exempt by the terms of their charter. We have already expressed the opinion that they are so exempt upon the facts found unless there is something more in the case. The plaintiff claims that there is. It is claimed on the part of the State that the resolution of 1850, which authorized an increase of the capital stock by the addition of four thousand two hundred and fifty shares, and constituted such additional stock, together with the old stock of such of the stockholders as subscribed for the new, "preferred stock," deprived such preferred stock of the benefits of the 17th section of the charter, or at least all except the original $1,000,000. These claims are not supported by authorities nor sustainable on principle; and it is obvious that the officers of the State have not distinguished between the capital of the corporation, strictly speaking, and the shares into which it is divided, and have misapprehended the character impressed upon a part of those shares by constituting them "preferred stock." It would perhaps be a sufficient answer to the claims to say that if the "preferred stock" is still a part of the capital stock, it is within the letter and spirit of the 17th section of the charter. If it is not a part of it, it is not within the letter or spirit of the statute which imposed the tax. But that such "preferred stock" is part of the capital stock of the company, entitled to all the privileges conferred by the charter, seems too clear to be questioned. The capital of the corporation consists of the sums due by virtue of the subscriptions, or collected from the subscribers and invested for its benefit; and the body of the subscribers, or their assigns, constitute the corporation. The subscribers to the new stock of 1850, as well as those who subscribed for the previously authorized additions, became *immediately* stockholders or shareholders, and the sums which they respectively became obligated to pay, became *immediately* part and parcel of the *capital* of the company. *Ward* v. *Griswoldville Manufacturing Co.* 16 Conn. 593.

It is the capital of the corporation which is in fact subjected to taxation or exempted from it, and the imposition of the tax according to the number and market value of the shares of stock, is but a means of ascertaining the taxable value of that capital. The provision in the resolution of 1850, that the new shares, and the old shares of the subscribers who took the new, should be "*called* preferred stock," did not render these subscribers any the less stockholders, or the sums due by virtue of their new subscription any the less a part of the *capital* of the corporation. The obvious, sole and simple purpose of the provision for constituting such new and old shares "preferred stock," was to encourage the taking of the new, by giving to those who should take it a preference in the division of the future earnings of the company. It reached and could reach no other provision of the charter than that relating to

such distribution. The new, and the old shares of those who subscribed for the new, had no other distinctive mark or character impressed upon them. They were "preferred" in no way and for no purpose over the shares of those who did not subscribe for the new stock, except in the making of dividends. The provision for the surrendry of the certificates and the delivery of new ones, had no object or purpose except to distinguish the shares of those who subscribed for the new, so that they could enjoy the intended preference in the distribution of the annual receipts. The "preferred stock" is to all other intents and purposes part and parcel, undistinguishably, of the capital stock of the company, and its holders are entitled to all the privileges, exemptions and rights conferred upon the original stockholders, and the sums by them subscribed for the new stock are as undistinguishably a part of the capital by which the dividends are to be earned for all, if sufficient, and on which the value of the stock for taxation when taxable is to depend. Any other construction of the resolution of 1850 would be strained, and against the clear intention of the legislature, and would be productive of embarrassments in conducting the affairs of this corporation which the general assembly never could have contemplated.

The result to which we come is, that the superior court must be advised that the defendants are entitled to judgment.

In this opinion the other judges concurred.

RECENT DECISION IN ENGLISH CRIMINAL LAW.

FORGERY.

Britian v. *Bank of London*, Q. B. 11 R. W. 569.

A curious and novel test of the definitions usually given of the crime of forgery arose in this case. Blackstone's definition of forgery at common law is that it is "the fraudulent making or alteration of a writing to the prejudice of another man's right." Since Blackstone's time the definition has been extended so as to include seals, and stamps where the revenue is prejudiced. It has been frequently held, moreover, that any material *alteration*, however slight, is as much a forgery as an entire fabrication, just as a fraudulent application of a false signature to a true instrument is a forgery equally with a real signature to a false instrument. The above-named case, however, if rightly decided, shows that Blackstone's definition is not strictly correct, inasmuch as although there had been "the fraudulent alteration of a writing to the prejudice of another man's right," yet the Court of Queen's Bench were unanimously of opinion that the act complained of did not amount to the crime of forgery. There the drawer of a cheque on a bank which was duly honored, and returned to him by the bank, afterwards altered his signature in order to give it the appearance of forgery, and to defraud the bank and cause the payee of the cheque to be charged with forgery.

The court were of opinion that inasmuch as the alteration in question did not alter the legal effect of the document, it did not amount to the crime of forgery.

Notices of New Books.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. By HORACE GRAY, JR. Volume IX. Boston: Little, Brown & Company. 1863. 8vo. pp. 580.

In 1755, Sir John Strange, in the preface to his Reports, wrote: "The profession of the law is already so overburthened with Reports, that I think it necessary, that every man who prepares anything of this kind for the press, should give some very particular reason for his doing so." We think that Mr. Horace Gray, Jr. should give "some very particular reason" for delaying for so long a time the publication of his volumes. Perhaps he is following the advice of his illustrious namesake, who, in his Art of Poetry, recommends that publication should not be hurried, and that a work should be retained until the ninth year. Nonumque prematur in annum. It is true Mr. Gray has many precedents for this delay. New Benloe was not printed until one hundred and thirty years after the decision of the cases it records. Anderson was printed in the same space of one hundred and thirty years afterwards. In Owen there is an interval of one hundred years; in Brownlow of eighty-three years. This volume contains the cases argued and determined in 1857. Fortunately the value of legal decisions is not impaired by time. Nullum tempus occurrit regi. Perhaps there is a sufficient reason for the delay. But the reporter gives none.

Mr. Gray's style of reporting is very good. His statement of a case is clean and orderly. The arguments, when presented at all, are well presented.

A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES. By EMORY WASHBURN, L.L. D. Philadelphia: George W. Childs. 1863. 8vo. pp. xxvii—640.

In England, few books have held such a high position as Gale's masterly Treatise on the Law of Easements. "A very excellent book," said Lord Campbell C. J. in *Renshaw* v. *Bean*, 18 Q. B. 124 (1852). "An excellent Treatise," said Lord Wensleydale in *Roubotham* v. *Wilson*, 8 House of Lords Cases, 359 (1860). "A work of much ability," says that first class authority, Williams's Notes to Saunders. 2 Saund. 400 *a*, ed. 1845. The first edition was published in 1839, the second in 1848, and the third in 1862, edited by W. H. Willes, Esq.

But notwithstanding the high character of this Treatise it is exclusively English. In the American Reports there are hundreds of cases on the subject, many of which, for keen discussion and exhaustive research, are not inferior to the English. A want therefore existed for a treatise in which the American and English cases might be found collected and stated in connection. This want Professor Washburn's book well supplies.

We have subjected the sheets of this volume to a rigid scrutiny as they were passing through the press, and have risen from their perusal under a strong conviction of the author's industry and accuracy. "He has had the happiness," to quote from old Fuller, "to reconcile brevity with clearness, qualities of great distance in other authors."